Supreme Court, U. S.
F I L E D
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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No. 75-556

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FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

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VOLUME IV

Pages 281 - 394

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

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| JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife,<br><br>Plaintiffs,<br><br>vs.<br><br>FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman,<br><br>Defendants,<br><br>vs.<br><br>TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation,<br><br>Additional Defendant on Counterclaim. | No. C-222472<br><br>F. M. COCKE'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW<br><br>Filed: January 17, 1972 |

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by

Buyers to have been wholly caused by F. M. Cocke, could have accrued.

1. As a matter of fact and law, whether the Minute Order of 9-23-71 constituted approval of plaintiff Buyers' proposed Amendment to their original Complaint attached to their Motion for Leave To Amend, filed August 11, 1971 which proposed Amendment incorporated by reference paragraphs I through VII and also the demand for judgment contained in the original Complaint, and in addition sought punitive damages from both defendants on an allegation of constructive fraud.

2. Inasmuch as Buyers in their original Complaint demanded judgment:

> 6. For reasonable damages for the failure of Defendants to close said Escrow as agreed and to convey said real property to M. Seth Horne and Maurine D. Horne, (emphasis added)

a. As a matter of fact and law, whether defendants can be compelled to instruct the trustee Bank to deliver into escrow its deed conveying the trust half-interest in Parcel 1 to M. Seth Horne and Maurine D. Horne, where the Bank's deed to such half-interest to James Stewart Company was delivered and accepted into escrow in October, 1968, without objection by Buyers or escrow agent, long before the purported nomination of the Hornes, and in view of the delivery into escrow by Buyers of an unsigned warranty deed to half-interest in Parcel 1 for signing by James Stewart Company during March, 1969, so ratifying the acceptance of the deed to the Company.

b. As a matter of fact and law, whether defendant F. M. Cocke can be compelled to deliver into escrow his deed conveying his half-interest in Parcel 1 to the Hornes, where his warranty deed conveying such half-interest to James Stewart Company was delivered and accepted into escrow in January, 1969 (Kavanaugh Deposition, page 21, line 14, to page 23, line 1), without objection by Buyers or escrow agent, long before he was notified of the purported nomination, and in view of the delivery into escrow by Buyers of the unsigned warranty deed from James Stewart Company mentioned in "a" just above;

c. As a matter of fact and law, and as affecting the claimed delay, whether F. M. Cocke was under any duty to recognize the purported nomination of the Hornes unless and until the $40,000 note and mortgage made out in favor of and held by James Stewart Company, or the extra $20,000 represented by such note and mortgage, was delivered into escrow, in view of the well settled rule that where a party to a contract is himself in default, he cannot compel performance by another party.

3. In paragraph 1 of Buyers' demand for judgment, Buyers demand that the escrow be ordered closed, and also demand that defendants, purportedly to end the claimed delay, cause Tranamerica to issue its title insurance policies to the Hornes (not to James Stewart Company), all in accordance with the agreement and escrow instructions.

a. In connection with Buyers' demand that the escrow be ordered closed,

as a matter of fact and law and as material to Buyers' claim of delay by F. M. Cocke, whether the closing of the escrow by cancellation in accordance with the escrow instructions, if so closed, constituted closing in accordance with the consolidated agreement and escrow instructions, as demanded by Buyers, in view of the well settled rule that where a contract contains provisions for its cancellation, the contract controls. 17 Am Jur 2d 969, Contracts Section 495.

b. Since Buyers have here admitted that it is the duty of the escrow agent, not the defendants, to close the escrow, and so deliver the deeds and title policies to Buyers, as a matter of fact and law whether Buyers' remedy for delay claimed to be caused by F. M. Cocke was an action against the escrow agent, in which Sellers could be properly joined, not an action against Sellers, in view of the well settled rule to that effect stated in 28 Am Jur 2d 51, Escrow, Section 39, and in 30A CJS 1014, Escrows, Sections 15, 16.

c. As far as the title insurance policies are concerned, in connection with the claimed delay by F. M. Cocke, as a matter of law whether paragraph 24 leaves it entirely up to Transamerica, not to the defendants, whether or not it will issue such policies.

d. As a matter of fact and law, affecting the delay claimed to be caused wholly by F. M. Cocke, whether Transamerica's objection (Kavanaugh Deposition, p. 22) to the inclusion of the small triangle in F. M. Cocke's deed to Parcel 2, delivered into escrow in January, 1969,

on Transamerica's claim that F. M. Cocke's title to the triangle was divested by a neighbor's quit-claim deed to the State, was a valid objection, where the neighbor neither had nor asserted (McCarthy Deposition, pp. 23-26) any claim thereto, and where the State claimed no right thereto based on such quit-claim (Court Records, Condemnation Case No. 183278).

e. As a matter of fact and law, whether Transamerica's unwillingness to issue its title policy on Parcel 2 as described in F. M. Cocke's deed to James Stewart Company (alleged and so admitted by Buyers in paragraph V of their Answer to F. M. Cocke's original Counterclaim) (see also Kavanaugh Deposition, page 7, line 24, and page 22) cancelled the escrow, instead of delaying close of same as desired by Buyers, under the mandatory and self-executing provisions of the fine print instruction paragraph 24, in view of the well settled rule that where a contract contains provisions for its cancellation, the contract controls. 17 Am Jur 2d 969, Contracts, Section 495.

4. On February 27, 1970, Transamerica asserted that it was at that time unable or unwilling to follow the Horne's escrow instructions, contained in their letter dated March 5, 1969, directing close of the escrow with payment of the trust land proceeds to Joan H. Cocke contrary to the trustee Bank's instructions (Kavanaugh Deposition, examination by escrow agent's attorney, page 42, line 16, through page 44, line 22), so reversing, despite trial and appellate court rulings that Joan H. Cocke was entitled to the trust land proceeds, the position taken by the escrow agent in the escrow

officer's letter of March 10, 1969 stating that Buyer had done everything required of him to close the escrow.

In view of this reversal of position by the escrow agent, and inasmuch as neither the Buyers in making their claim for damages suffered by reason of claimed delay by F. M. Cocke in the closing of the escrow, nor the Court in its Minute Order of December 8, 1970 granting Buyers' Motion for Summary Judgment, have specified the particular date which marked the beginning of the time period of such claimed delay:

a. As a matter of fact and law whether Buyers are entitled to damages from F. M. Cocke for the period March 5, 1969 through February 27, 1970 on Buyers' contention that they were in full compliance throughout this period with respect to:

(1) Buyers' check, note and mortgage enclosed in the Horne letter purportedly representing the balance due on the trust land but all made out in favor of Joan H. Cocke;

(2) Buyers' note and mortgage purportedly representing the balance due on the trust half-interest in Parcel 1 but which were $32,000 deficient, since the Hornes' letter demanded recording of the deeds and mortgages BEFORE payment of the $32,000 due January 2, 1969;

(3) Buyers' note and mortgage purportedly representing the balance due on F. M. Cocke's half-interest in Parcel 1 but which were $32,000 deficient, since the Hornes' letter demanded recording of

the deeds and mortgages BEFORE payment of the $32,000 due January 2, 1969.

(4) Buyers' demand in the Horne letter for warranty deeds to Parcels 1A and 2A, not retracted during the period March 5, 1969 through February 27, 1970 (Kavanaugh Deposition, pp. 19, 25-29, 31, 32).

(5) Buyers' failure to deliver into escrow the $40,000 note and mortgage, or substitute funds in the amount of the extra $20,000 represented by same.

b. As a matter of fact and law affecting the claimed delay, whether Buyers' willingness and ability, as claimed in Buyers' Pretrial Memorandum, to comply with the consolidated contract at any time subsequent to the filing of F. M. Cocke's notice of cancellation on March 5, 1969, the same date as on the Horne letter, was or is material to any failure on the part of the Buyers to comply, in view of the well settled rule that there is no doctrine or substantial compliance of escrow agreements, that compliance must be full and to the letter, or else it constitutes merely noncompliance, and that the ability to perform is immaterial. 28 Am Jur 2d 31, Escrow, Section 21; 30A CJS 999, Escrows, Section 10.

c. As a matter of fact and law affecting the claimed delay, whether the escrow was cancelled under instruction paragraphs 16-23, at the end of the 13-day period following F. M. Cocke's filing of his notice of intention to cancel, by non-compliance by Buyers as set forth above under "4a".

d. As a matter of fact and law affecting the claim of delay wholly by F. M. Cocke, whether F. M. Cocke's proposed Agreement on Distribution of Funds, Mortgages, Releases and Commissions, which he executed and delivered into escrow in January, 1969, as proposed joint instructions by F. M. Cocke and Joan H. Cocke as to the disposition of the trust land proceeds, was in accordance with the trustee Bank's instructions to the escrow agent, and in accordance with the letter of instructions of October 10, 1968 to the trustee Bank signed by F. M. Cocke and Joan H. Cocke, and in accordance with their subsequent agreement that Parcel 1 would be valued at $500 per acre above the average price to be received but that the broker's commission on same would be computed at the average price.

e. As a matter of fact and law affecting the claim of delay wholly by F. M. Cocke, whether F. M. Cocke's proposed Agreement on Distribution of Funds, Mortgages, Releases and Commissions was repudiated by Joan H. Cocke by her letter of instructions to the escrow agent dated February 26, 1969, was repudiated by Buyers by their making out in favor of Joan H. Cocke the check, note and mortgage purportedly representing the balance due on the trust half-interest in Parcel 1, and was repudiated by the escrow agent until February 27, 1970 by the escrow officer's letter of March 10, 1969 approving such payment to Joan H. Cocke, and is still repudiated by the escrow agent by the approval in such letter of the recording of the deeds and mortgages BEFORE the payment of the two $32,000 payments, which mortgages reflected the balance due AFTER such payment.

f. As a matter of fact and law affecting Buyers' claim of delay in their proposed development, wholly caused by F. M. Cocke, whether under the consolidated contract the two $32,000 payments were the only payments entitling Buyers to releases, and whether the Hornes' letter of instructions to the escrow agent specified that such payment and therefore the releases, and Buyers' development, must await the delivery into escrow by Sellers of warranty deeds to Parcels 1A and 2A, to which Sellers have never had title, and must await the recording of the deeds and mortgages at a time when such mortgages totalled $64,000 less than the balance due.

Respectfully submitted this
17th day of January, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

BUYERS' AMENDMENT TO COMPLAINT FOR SPECIFIC PERFORMANCE OF REAL ESTATE CONTRACT AND DAMAGES

Filed: January 27, 1972

For Amendment to the Complaint filed herein, Plaintiffs allege:

Count II

I

Plaintiffs incorporate herein by reference, the same as if herein set forth in full, the allegations contained in Paragraphs I through VII of the Complaint filed in this cause, and as if such allegations had been re-alleged and averred here in full.

II

At the time said real estate contract and escrow instructions were entered into, defendants were informed by plaintiffs that they were acquiring said property for the purposes of development and that plaintiffs intended to construct, and still intend to construct, approximately 1,250 apartment units on such property, a shopping center on approximately 10 acres of said property and develop the

balance for industrial purposes.

III

In anticipation of the conveyance of said property by defendants, plaintiffs incurred expenses for plans and designs incident to the proposed development of the subject property, which plans and designs, due to the delay caused by defendants' failure to convey the subject property to plaintiffs, are no longer usable in connection with the development of the property, all to the damage of plaintiffs.

The exact amount of such damages is as yet undetermined, but proof thereof will be offered at the trial of this cause.

IV

Since the aforesaid contract and escrow instructions were entered into by plaintiffs and defendants, costs of construction have increased and continue to increase, and plaintiffs' development costs of the subject property will increase, which increase is caused by defendants' failure to convey the subject property to plaintiffs, all to the damage of plaintiffs. The exact amount of such increased costs, which increased costs are continuing, is as yet undetermined and unknown to plaintiffs, but proof thereof will be offered at the trial of this cause.

V

Since the aforesaid contract and escrow instructions were entered into by Plaintiffs and the Defendants, costs of construction and mortgage money has

increased over the rate that was available to plaintiffs at the time the aforesaid contract and escrow instructions were entered into, the additional cost of such financing being caused by defendants' failure to convey the subject property to plaintiffs, all to the damage of plaintiffs. The exact amount of such increased costs, which are continuing, is as yet undetermined and unknown to plaintiffs, but proof thereof will be offered at the trial of this cause.

VI

The defendants' failure to convey the subject property has delayed its development by plaintiffs, and as a consequence thereof, plaintiffs have incurred loss of rents and profits which would have been derived from such property from the time of its development to the present. Since entering into the aforesaid contract, other property surrounding the subject property has been developed in the same manner as contemplated by plaintiffs and, therefore, the future rents and profits which can be realized by plaintiffs have been reduced by defendants' failure to convey the subject property to plaintiffs. The exact amount of the loss of past rents and profits, as well as those expected in the future, which are continuing, is as yet unknown to plaintiffs but proof thereof will be offered at the trial of this cause.

VII

Plaintiffs paid the amounts alleged in the original Complaint filed herein and incurred and paid the additional costs as alleged in this Count II, by reason of

the entering into the aforesaid contract and escrow instructions, and the defendants' promise that title to the subject property would be conveyed to them. Due to the failure of defendants to convey title to plaintiffs in accordance with the aforesaid contract and escrow instructions plaintiffs have lost the use of their money so incurred and paid, and are entitled to interest thereon. The exact amount of such damages is as yet unknown to plaintiffs, and such damages are continuing, but proof thereof will be offered at the trial of this cause.

VIII

Plaintiffs have employed attorneys to institute this cause of action and that cause of action as alleged in the original Complaint filed herein. The necessity of such action on the part of the plaintiffs was occasioned by the defendants' failure to convey the subject real estate in accordance with the terms of the aforesaid contract and escrow instructions. The exact amount of such damages is unknown to plaintiffs as yet, and such costs are continuing, but proof thereof shall be offered at the trial of this cause.

IX

In the alternative, defendants have retained possession of the subject property by reason of their failure to comply with the terms of the aforesaid contract. Such action on the part of defendants was wrongful and to the loss and damage of the plaintiffs to the extent of the uses, profits and fair rental value derived from the subject property. The exact amount

of such loss and damage is unknown to the plaintiffs as of this time, and is continuing, but proof thereof shall be made at the trial of this cause.

WHEREFORE, plaintiffs demand, in addition to the demand for judgment set forth in the original complaint, which is hereby incorporated herein by reference, judgment against the defendants for damages to the plaintiffs as follows:

1. Damages for expenses incurred by plaintiffs for plans and designs for the development of the subject property in the amount to be determined from the evidence at the trial of this cause;

2. Damages for the increase in construction costs for the development of the subject property in an amount to be determined from the evidence at the trial of this cause;

3. Damages for the increased costs of interim construction and mortgage money in connection with the development of the subject property in an amount to be determined from the evidence at the trial of this cause;

4. Damages for the loss of past and future rents and profits to plaintiffs by reason of defendants' delay in conveying the subject property in an amount to be determined from the evidence at the trial of this cause;

5. Damages for loss of the use of monies invested in the subject property in an amount to be determined from the evidence at the trial of this cause;

6. Damages for expenses incurred by plaintiffs in enforcing the terms of the aforesaid contract and escrow instructions in an amount to be determined from the evidence at the trial of this cause;

7. In the alternative, damages for the uses, profits and fair rental value of the subject property in an amount to be determined from the evidence at the trial of this cause;

8. For the costs of this action and such other and further relief as to the Court seems just and proper in the premises.

Dated at Phoenix, Arizona, this 27th day of January, 1972.

RANDOLPH, KELLY & CORBIN

By /s/ Hubert E. Kelly

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO STRIKE BUYERS' AMENDMENT TO COMPLAINT; MOTION TO DISMISS BUYERS' ORIGINAL COMPLAINT AND ALL AMENDMENTS; AND MOTION FOR JUDGMENT ON THE PLEADINGS

Filed: February 7, 1972

Defendant F. M. Cocke moves the Court to strike plaintiff Buyers' Amendment to Complaint, filed January 27, 1972, to dismiss Buyers' original complaint filed in April, 1969, and all amendments filed thereafter, and for judgment on the pleadings on his counterclaim against Buyers, upon the following grounds.

MOTION TO STRIKE AMENDMENT
OF JANUARY 27, 1972

Plaintiff Buyers' proposed Amendment filed January 27, 1972, does not conform to the Court's leave to amend granted by the Minute Orders of September 15 and 23, 1971. The minute orders denied leave to amend as to damages as far as Joan H. Cocke is concerned. Buyers' proposed Amendment demands judgment as follows:

"WHEREFORE, plaintiffs demand, in addition to the demand for judgment set forth in the original complaint, which

is hereby incorporated herein by reference, judgment against the defendants for damages to the plaintiffs as follows:. . ."

On the face of the record it is manifest that Buyers' Amendment should be stricken, unless the Minute Orders of September 15 and 23, 1971 are amended. This defendant is entitled before the trial on damages to a ruling on whether or not he is to be the sole party with obligations under the consolidated real estate and escrow agreement at such trial, in the event it be held as now scheduled.

MOTION TO DISMISS

Clearly, this Court was and is without jurisdiction over the subject matter of Buyers' complaint, in its original form and as sought to be amended, since no court has the power to grant the relief demanded by Buyers. Buyers demand specific performance of the consolidated real estate agreement and escrow agreement with Transamerica without joining Transamerica. 16 ARS, Rules of Civil Procedure 12(b)1, 6 and 7, as amended and 12(i) 2 and 3, as amended.

I.

JURISDICTION OF THE COURT

A preliminary question is one of jurisdiction.

State of Minnesota v. Hitchcock, 185 U.S. 373, 46 L.ed 954, 22 S. Ct. 650, states the rule that:

> A preliminary question is one of jurisdiction. It is true counsel

> for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law.

By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Cooper v. Reynolds, 10 Wall (U.S.) 308, 316; 19 L.ed 931.

The following cases are material here as showing fundamental doctrines as enunciated by the Arizona Supreme Court. State trial court judges have for many years been charged with knowledge of these fundamentals.

> No court may acquire complete jurisdiction to hear and determine any cause until it has obtained through due process, prescribed by law, jurisdiction over both subject matter and the parties, and the power to render the particular judgment that was rendered.

Schuster v. Schuster (1953) 75 Ariz. 20, 251 P.2d 631; Van Ness v. Superior Court of State in and for Maricopa County (1950) 69 Ariz. 362, 213 P.2d 899; Wall v. Superior Court of Yavapai County (1939) 53 Ariz. 344, 89 P.2d 624.

The first duty of any court is to determine whether it has jurisdiction in the premises, and in so determining it is acting judiciously. State v. Phelps (1948) 67 Ariz. 215, 193 P.2d 921.

Jurisdiction of the subject matter cannot be waived, as by all parties' acquiescence in the proceedings had, and the question of the court's jurisdiction over the subject matter may be raised at any time, as on appeal for the first time. In re Baxter's Estate (1921) 22 Ariz. 91, 194 P. 333.

A judgment is void on its face and is subject to collateral attack unless court has jurisdiction of the subject matter, of the persons involved in the litigation, and to render the particular judgment given. Hallford v. Industrial Commission (1945) 63 Ariz. 40, 159 P.2d 305; Latham v. McClenny (1930) 36 Ariz. 337, 285 P. 684. (emphasis added)

Buyers' Complaint incorporated as an exhibit a copy of the consolidated real estate and escrow agreement of October 9, 1968 with Transamerica. A copy is attached hereto. The face of the complaint, therefore, made it clear to all who read

it that the proposed sale and purchase was to be consummated, or was to fail, in accordance with the applicable provisions of the escrow agreement. Further, an examination of the fine print paragraphs 16-25 (enlarged) will reveal that the powers granted to the escrow agent, and the duties imposed upon it, by Buyer and Seller, actually made Transamerica the dominant party to the consolidated contract in the determination thereunder of whether such consummation or such failure was to be the final result. Paragraphs 16-23 of the fine print escrow instructions, in the event of noncompliance with the escrow instructions by either Seller or Buyer during the specified 13-day cancellation period, command cancellation of the escrow instructions and other contracts, and their retention, and authorize Transamerica to return documents such as deeds. Paragraph 24 commands Transamerica to return or retain the documents in the event of Transamerica's own inability or unwillingness to comply with the escrow instructions, or its own unwillingness to issue its title policy.

It is elemental that a party to a contract cannot come into court, as did Buyers, seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations, and the rights and obligations of the other parties, under the other provisions also incorporated into its pleading, since such relief is beyond the power or jurisdiction of the court to grant. Clearly, neither Buyers nor the court had any more power to delete the cancellation provisions from the escrow instructions portion of the consolidated contract than to add Parcels

1A and 2A to the real estate portion. Likewise, neither had any more power to reduce the price per acre in the real estate portion, so that F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1 could be properly recorded subject to mortgages to be simultaneously recorded for $52,000 less than the amount due, than to rewrite the trustee Bank's escrow instructions to specify control of the trust land proceeds by Joan H. Cocke instead of Joan H. Cocke and F. M. Cocke jointly.

As pointed out in a unanimous decision by the Supreme Court, sitting en banc, in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

And quoting McCall v. Carlson, 63 Nev. 390, 172 P.2d 171, 187-188:

> Our equitable powers do not extend so far as to permit us to disregard fundamental principles of the law of contracts, or arbitrarily to force upon parties contractural

> obligations, terms or conditions, which they have not voluntarily assumed. In this regard, equity respects and upholds the fundamental right of the individual to complete freedom to contract or decline to do so, as he conceives to be for his best interest, so long as his contract is not illegal or against public policy. In this respect, and many others, equity follows the law.

And citing Man. Finance Co. v. McKey, 294 U.S. 442, 55 S. Ct. 444, 79 L.ed 982; Cox v. Freeman, 204 Okl. 138, 227 P.2d 670, 28 ALR 2d 1230:

> It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh.

Manifestly, the Goodman v. Newzona decision is in complete accord with the prohibition against impairment of contract obligations by state courts contained in Article 1, Section 10, of the United States Constitution and in the due process and equal protection clause of the Fourteenth Amendment.

In 21 CJS, Courts, Section 120, CJS relies on McKnett v. St. Louis and San Francisco Railway Co., 292 U.S. 230, 54 S. Ct. 690, 78 L.ed 1227, reversing 149 So. 822, 227 Ala. 349, for this well settled doctrine:

> The power of a State to determine the limits of jurisdiction of its courts and the character of the controversies which shall be heard is, of course, subject to the

> restrictions imposed by the Federal Constitution. (emphasis added)

The Alabama Supreme Court had held that:

> The question whether the (Alabama) circuit court had jurisdiction is to be determined by the Constitution and laws of this state creating the courts and defining and limiting their jurisdiction. There is no restriction of the Federal Constitution upon the power of a state to determine the limits of the jurisdiction of its courts, except that the state must give to the citizen of other states the same rights that it accords to its own citizens. (emphasis added)

In Evans v. Hallas (1946) 64 Ariz. 142, 167 P.2d 94, the Arizona Court pointed out that neither the legislative, the executive, nor the judicial departments have the power to deprive a person of a right granted by the Arizona Constitution. Since that constitution adopts the Federal Constitution as the supreme law of the land, it is of course clear that a state court is completely without the power, or jurisdiction, to deprive a person of the rights or immunities granted by the Federal Constitution. One of these is the right to enforce contract obligations, without impairment by the judicial department.

16 Am Jur 2d 643, Constitutional Law, quotes Scott v. McNeal, 154 U.S. 34, 38 L.ed 896, 14 S.Ct. 1108:

> The prohibitions of the Fourteenth Amendment, against depriving any person of life, liberty or property with-

> out due process of law or denying the equal protection of the laws, extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities.

In Section 491, Am Jur 2d points out that the inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial, and quotes Shelley v. Kraemer, 334 U.S. 1, 92 L.ed 1161, 68 S. Ct. 836, 3 ALR 2d 441:

> The action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the equal protection clause.
>
> (emphasis added)

An obligation owing under a contract is property, and equal protection of the laws obviously protects against judicial enforcement of contract obligations against less than all parties mutually bound.

Speaking of the due process clause of the Fourteenth Amendment, Am Jur 2d states in Section 554:

> The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials. The guaranty is violated whenever any person, by virtue of public position under the federal or state government, deprives another of any right protected by that amendment.

As stated by 21 CJS, Courts, the authority to hear the case at all is what makes up jurisdiction (Section 26), and the subject matter of a suit means the nature of the cause of action, and the relief sought (Section 35b).

It is pointed out in 49 CJS, Judgments, Section 19a, 19c, and 19d, that a court cannot render a valid judgment unless it has jurisdiction over the subject matter of the litigation or the cause of action, and jurisdiction to render judgment for the particular remedy or relief sought, citing:

Varnes v. White, 40 Ariz. 427, 12 P.2d 870; Wall v. Superior Court of Yavapai County, 53 Ariz. 344, 89 P.2d 624; Hill v. Favour, 52 Ariz. 561, 84 P.2d 575; Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 P. 251; Western Land & Cattle Co. v. National Bank of Arizona at Phoenix, 29 Ariz. 51, 239 P. 299.

It is crystal clear from the face of Buyers' complaint and the face of the consolidated real estate and escrow agreement sought to be enforced, and incorporated into the complaint as an exhibit, that Buyers' cause of action was a claimed right to relief by performance of less than all the mutually binding provisions by less than all the parties mutually bound, and therefore crystal clear that the cause of action was a claimed right to relief by impairment of contract obligations and by denial of due process and equal protection of the laws.

It must be concluded, therefore, that the trial court had and has no jurisdiction over the subject matter of Buyers' complaint and no authority to proceed on the complaint at all, except to dismiss it.

* * *

The following three cases may help to clear up some of the apparent confusion in connection with the term "indispensable party."

In Connally v. Great Basin Insurance Co. (1967) 6 Ariz. App. 280, 431 P.2d 921, the court said:

> Traditionally, parties have been divided into categories of "proper," "necessary," and "indispensable." See Oglesby v. Chandler, 37 Ariz. 1, 288 P. 1034 (1930) and Clarke, Code Pleading (2d ed. 1947), pp. 358-362, 365-367, 380-386. It appears to be the law of this jurisdiction that the failure to join an "indispensable" party is a jurisdictional defect and deprives the court of the power to adjudicate as between the parties already joined. Siler v. Superior Court, 83 Ariz. 49, 316 P.2d 296 (1957); and see Gorsuch v. Fireman's Fund Insurance Co., 360 F.2d 23 (9th Cir. 1966).

In Gorsuch, the 9th Circuit Court of Appeals said:

> We recently had occasion to deal with the problem of indispensable parties in Lewis v. Lewis, 9 Cir., 358 F2d 495, decided on March 14, 1966. We there noted and applied the governing principles as stated in State of Washington v. United States, 9 Cir., 87 F.2d 421, 427-428. Applying the same principles here we hold that Doig is an indispensable party to the determination of the rights and obligations involved in the suit now before us. (emphasis added)

and in State of Washington v. United States (1936), the 9th Circuit said:

In cases where there is error in non-joinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as "jurisdictional." The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from Shields v. Barrow, supra., 17 How. 130, 141, 15 L.ed 158: "As is observed by this court, in Mallow v. Hinde, 12 Wheat. (193) 198 (6 L.ed 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'" See, also, Barney v. Baltimore, supra., 6 Wall. 280, 285, 18 L.ed 825; State of California v. Southern Pac. Co., supra., 157 U.S. 229, 250, 15 S. Ct. 591, 39 L.ed 683; Minnesota v. Northern Securities Co., supra., 184 U.S. 199, 236, 22 S. Ct. 308, 46 L.ed 499; Bogart v. Southern Pac. Co., supra., 228 U.S. 137, 146, 33 S. Ct. 497, 57 L.ed 768.

It is abundantly clear that whether one of the parties to a valid contract be called "necessary" or "indispensable," no court can enforce either his rights against the other parties or his obligations owed to them, unless he is joined in the action. Since no court can rewrite the contract so as to delete any of its provisions, but must enforce the entire contract, in the absence of any party mutually bound, in favor of whom or against whom any mutual

right or obligation must be enforced, the court cannot proceed at all.

Obviously, parties subject to joinder over whom the court has no jurisdiction merely because not named, and whose absence leaves the court without power to grant the relief sought, and so without jurisdiction over the subject matter, qualify as parties indispensable under Rule 19.

II

EFFECTS OF LACK OF JURISDICTION OVER SUBJECT MATTER

It is pointed out in 21 CJS, Courts, Sections 113-119, and cases cited, that the judge of a court is bound to make a preliminary examination of the court's jurisdiction over the subject matter, particularly where such lack of jurisdiction appears on the face of the complaint, as here; that where the court is without jurisdiction the acts of the court or the judge are a mere nullity and void, not voidable, and the court is without power to allow an amendment which would confer jurisdiction.

Since the court itself is without power to act without jurisdiction over the subject matter, it is clear that any such act is the act of the judge, not the court. This is borne out in 46 Am Jur 2d, Judges, Sections 75-81, and cited cases, which state the rule that where there is no jurisdiction over the subject matter, the exercise of any authority by the judge is a usurpation, and the judge, not the court, is liable.

This rule, that it is only the judge

and not the court that has proceeded without court jurisdiction over the subject matter, is the basis for the further rule (21 CJS, Courts, Sections 108-112) that a lack of such jurisdiction is not waived by answer, general demurrer, failing to demur, failing to object to, or otherwise raise the question of jurisdiction, going to trial on the merits, moving for a new trial, appealing, or partially complying with the judgment. Moreover, jurisdiction over the subject matter cannot be based on estoppel or waiver, and lack of it may be objected to in any manner and at any stage of the proceedings, even on appeal.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S. Ct. 236, the court pointed out, quoting Scott v. McNeal, 154 U.S. 34, 46; 38 L.ed 896, 901; 14 S. Ct. 1108, that:

> No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

and went on to say:

> No state can, by any tribunal or representative, render nugatory a provision of the supreme law.
>
> Such is the settled doctrine of this court. In the leading case of Thompson v. Whitman, 18 Wall. 457, 468, 21 L.ed 897, 901, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in

one state may be questioned in a collateral proceeding in another state, notwithstanding the averments in the record of the judgment itself. The court, among other things, said that if it be once conceded that "the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent." This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in Rose v. Himely, 4 Cranch, 241, 269, 2 L.ed 608, 617, that, upon principle, the operation of every judgment must depend on the power of the court to render that judgment. In Williamson v. Berry, 8 How. 495, 540, 12 L.ed 1170, 1189, it was said to be well settled that the jurisdiction of any court exercising authority over a subject "may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings," and that the rule prevails whether "decree

> or judgment has been given in a court of admiralty, chancery, ecclesiatical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municiple laws of states." (emphasis added)

Objections to the jurisdiction of the court below, when they go to the subject matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court. Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 25 L.ed 206.

In Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398, the court said:

> Want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under the judgment, since want of jurisdiction makes the judgment utterly void and unavailable for any purpose.

In Clark v. Arizona Mut. Savings & Loan Assn. (D.C. 1914) 217 F. 640, affirmed 220 F. 1, 135 C.C.A. 577, certiorari denied 35 S. Ct. 791, 238 U.S. 628, 59 L.ed 1496, the court said:

> Although a court has jurisdiction of the subject matter and of the parties, its power to render a valid judgment is limited by the nature of the suit and the issues made by the pleadings, and if it transcends such limits its judgment is void. (emphasis added)

In Parker v. Uchida (1912) 14 Ariz. 57, 125 P. 715, the court said:

> As a general rule defects in the court's jurisdiction over the subject matter of an action cannot be cured.

In Morris v. Gilmer, 129 U.S. 315, 32 L.ed 690, 9 S. Ct. 289, the court pointed out:

> But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (28:462, 463) "which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it."

In Ronan v. First National Bank of Arizona (1962) 90 Ariz. 341, 367 P.2d 950, the court, sitting en banc, unanimously concurred in an opinion written by Justice Lockwood holding that the judgment of the trial court was void ab initio in the absence without notice of one of the beneficiaries of a trust contract. The case concerned four minor children who, the court held, were not properly brought before the court. The court said, quoting Sleeper v. Killion, 166 Iowa 205, 214, 147 N.W. 314, 317 (1914), a case in which the parents were served on behalf of the minors in accordance with the statute but the minors were named only in the petition:

> All these cases. . . (holding such service void) are predicated on the thought that no one can be deprived of life, liberty, or property without due process of law; that notice is essential to due process of law; that in the citation, summons, or process of any kind requiring a person to appear in a court of record, to answer to a charge made against him, he must have notice of the proceedings.

and the Arizona Court said:

> The minors are contingent beneficiaries under the trust, and the instrument provides that they are to receive the corpus upon the trust's termination. They are indispensable parties in any determination of the disposition of the trust funds, which would inevitably affect their rights thereunder. Thus a decision in accordance with C. B.'s wishes of necessity dim-

> inishes the corpus in which the minors have an interest, and no judgment can be rendered. . .without injuriously affecting the rights of others not brought into action. Therefore the minors were indispensable parties to the suit.
>
> For the foregoing reasons we hold the judgment below was void ab initio, and is therefore set aside. (emphasis added)

The Arizona Court's decision is in complete accord with the federal cases cited and quoted above, particularly with Shields v. Barrow, 17 How. 130, 141, 15 L.ed 158, quoted by the 9th Circuit in State of Washington v. United States (page 9 above).

In Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F. 2d 514, states the rule as follows:

> The threshold question is whether jurisdiction exists. Appellant strenuously asserts that there was no jurisdiction in the district court, and that we must therefore vacate the and remand with directions to dismiss. Jurisdiction was not challenged in the district court, in fact all parties proceeded as though the court had power to act. However, as suggested by appellant, jurisdiction may not be conferred by consent and lack of jurisdiction of the subject matter cannot be waived by the parties or ignored by the court; if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to

> correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of Rock Island Millwork Co., v. Hedges-Gough Lumber Co., 337 F.2d 24, 26-27 (8 Cir. 1964).

Rule of Civil Procedure 12 (i), 16 ARS, page 41 of the 1971-72 Pocket Part, includes, in accordance with the above cases:

> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (emphasis added)

## III

## JURSIDICTION OVER CONTRACTUAL RIGHTS AND OBLIGATIONS

The early case of Mallow v. Hinde, 12 Wheat (193) 198, 6 L.ed 599, cited and quoted in Shields v. Barrow by the 9th Circuit, in State of Washington v. United States (page 9 above), goes in simple language to the very root of the issue in the present case, which is the power of the trial court to adjudicate the rights and obligations of all the parties mutually bound by a multiparty contract without all of them before the court. In that case, as here, executory agreements were before the court, but without all the parties thereto whose right would have to be determined. The court said:

> This is an appeal from the decree of the Circuit Court for the district of Ohio, dismissing generally, with costs,

the bill of the appellants, who were plaintiffs in that court.

The suit was a contest for land in the district set apart on the northwest side of the Ohio, for the satisfaction of the bounty lands due to the officers and soldiers of the Virginia line, or continental establishment, in the revoluntionary war.

Neither Taylor, the trustee, nor the cestuis que trust, with whom the complainants allege Langham contracted for the land, are made defendants, they being out of the limits of the jurisdiction of the court.

For the appellees it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion. . . .They claim that survey, not by any assignment, or other instrument, investing them with a legal right to it, but by executory agreements, the validity and obligation of which the parties to them have a right to contest.

We cannot try their validity, and decide upon their efficacy, by affirming they confer upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court. The complainants can derive no claim in equity to the survey, under, or through Langham's executory contracts with the Beards, unless these contracts be such as ought to be decreed against them

specifically by a court of equity. How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to all the rules which govern courts of equity, and against the principles of natural justice.

In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

> We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court. (emphasis added)

Mallow v. Hinde is startlingly close to being on all fours with the present case, except that in that case some of the parties to the agreements were not made parties to the suit because they were out of the territorial limits of the jurisdiction of the court. Here, all the parties to the consolidated real estate and escrow agreement were and are subject to joinder,

but some were simply not named.

Perhaps the best way to illustrate the futility of attempting to make a final determination of the rights and obligations of all the parties to the executory agreement in this present case, without joinder of all such parties, is to point out the predicament in which the various parties to the agreement would be left by the proposed piecemeal adjudication, in addition to the abuse of process inherent therein.

It is not disputed that on March 5, 1969, immediately following the unsuccessful attempt by Buyers and the escrow officer to obtain F. M. Cocke's signature to the warranty deed which included Parcel 2A and a half-interest in Parcel 1A, F. M. Cocke filed a notice of intention to cancel upon failure of Buyers to comply with the escrow instructions within the 13-day period, as provided by paragraphs 16-23 and 25 of the fine print escrow instructions.

And it is not disputed that the Buyers' letter, dated March 5, 1969, of instructions to Transamerica as escrow agent, received by it on March 7, 1969, directed it to:

ITEM I. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the delivery of its deed into escrow in October, 1968.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers. These parcels are long narrow strips of land which contain a large drainage canal, abutting the south boundary lines of Parcels 1 and 2. Neither the trustee Bank nor F. M. Cocke has ever executed any deeds to Parcels 1A or 2A, either quit-claim or warranty, since neither had title. Such parcels were for that reason specifically excluded from the land agreed to be sold, and were not the subject of any contract.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, delivered into escrow by means of Buyers' letter, as the annual payment which entitled Buyers to their first releases, which as provided they had chosen to take in Parcel 1.

In a second letter to the escrow agent dated March 26, 1969, Buyers affirmed the position taken by them in their letter of instruction to the escrow agent dated March 5, 1969.

ITEM 1

The trustee Bank's instructions to the escrow agent provided for joint control of the principal proceeds of the proposed sale by F. M. Cocke and Joan H. Cocke, in accordance with the trust agreement. However, Buyers made out their check, note and mortgage, purportedly representing the balance

due on the trust land, in favor of Joan H. Cocke. This was approved by Transamerica on March 10, 1969, but it reversed its position on February 27, 1970, taking the position it could not use the Bank's deed, because payment of the proceeds to Joan H. Cocke violated the Bank's instructions.

Neither Transamerica, the trustee Bank, nor any of the three trust remaindermen were named in Buyers' Complaint, and the trial judge's Minute Order of December 8, 1970 granted summary judgment in favor of Buyers against only F. M. Cocke, not against Joan H. Cocke. Further litigation will therefore be necessary to determine whether or not:

(1) a court can rewrite the trust agreement or the trustee Bank's escrow instructions, as held in Cocke v. Cocke (September, 1970) 13 Ariz. App. 57, 474 P.2d 64;

(2) if not, whether or not Transamerica can continue to refuse to deliver the Bank's deed to Buyers, with title policy;

(3) if not, since it is well settled that if the deed is delivered in violation of the Bank's escrow instructions it will vest no title in grantee, and also well settled that the remaindermen can follow either the land or the proceeds to recover their losses, and if they retake the land, whether or not Transamerica can refuse to refund to Buyers, under the title policy, the $124,000 caused to be paid to Joan H. Cocke;

(4) if not, whether or not Transamerica can recover its loss of the $124,000

from any person connected with the case, and

(5) if the answer to (2) is yes, whether the three remaindermen can recover from trustee Transamerica or the trustee Bank or any other person connected with the case any trust principal funds paid to Joan H. Cocke because of lack of interest income on trust property proceeds, with punitive damages, or any trust principal funds taken by Joan H. Cocke by garnishment under Cocke v. Cocke.

Clearly, Transamerica overlooked until February 27, 1970, and Buyers and this Court continue to disregard, the undisputed fact that when Joan H. Cocke signed the consolidated agreement on October 9, 1968, she agreed to sell only the interest she then had in the trust land: the lifetime beneficial interest entitling her to the income from the trust half-interest in the particular piece of land designated as Parcel 1. Under settled doctrines of trust law she could have insisted on this particular income if she had not agreed to the sale by signing, at the same time as F. M. Cocke. On October 9, 1968, the legal title to the trust half-interest in Parcel 1 remained indisputably in the trustee Bank and the equitable title in the three remaindermen daughters. These facts were made known to all parties to the escrow agreement before any papers were signed. It was the trustee Bank, not Joan H. Cocke, which executed the deed to the trust half-interest in Parcel 1, on joint instructions from F. M. Cocke and Joan H. Cocke, as required by the trust agreement. It was the trustee Bank, not Joan H. Cocke, which placed the condition on the sale of the trust land, accompanying the delivery of its deed into

escrow, that the proceeds were to be jointly controlled by Joan H. Cocke and F. M. Cocke, as was the land itself. And it is the trustee Bank, not Joan H. Cocke, whose presence would be necessary in any determination that such condition as to the proceeds is to be rewritten. The presence of all three of the remaindermen daughters would also be necessary, if such condition can be rewritten at all.

ITEM 2

The approval by Transamerica on March 10, 1969, of the proposed simultaneous recording of the trustee Bank's deed and of the mortgage for $32,000 less than the balance due, not yet retracted, and the approval thereof by the trial judge, implicit in his judgment in favor of Transamerica on its counterclaim and in his minute order in favor of Buyers on their complaint, will require further litigation:

(1) to overturn the fundamental and well settled doctrines of Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412, and cases cited, with respect to the rewriting of escrow instructions by an escrow agent;

(2) to overturn the fundamental and well settled doctrines of Goodman v. Newzona, quoted above at page 5, with respect to the rewriting of contracts by a court; and

(3) to overturn the fundamental and well settled doctrines of Mallow v. Hinde, quoted above at pages 15-17, with respect to the absence of the trustee Bank and the rewriting of its escrow instructions to Transamerica.

ITEM 3

The approval by Transamerica on March 10, 1969, of the proposed simultaneous recording of F. M. Cocke's deeds and of the mortgages for $52,000 less than the balance due, not yet retracted, and the approval thereof by the trial judge, implicit in his judgment and minute order in favor of Transamerica on its counterclaim and Buyers on their complaint, as in Item 2, will require further litigation:

(1) to overturn Higgins v. Kittleson and Goodman v. Newzona with respect to the rewriting of real estate contracts and escrow instructions by an escrow agent or by a court, as in Item 2.

ITEM 4

The approval by Transamerica on March 10, 1969, of the escrow officer's attempt on March 5, 1969 to secure, and of Buyers' demand for, warranty deeds to Parcels 1A and 2A, not part of any contract, and the approval thereof by the trial judge, implicit in his judgment and minute order in favor of Transamerica on its counterclaim and Buyers on their complaint, as in Item 2, will require further litigation:

(1) to overturn Higgins v. Kittleson and Goodman v. Newzona with respect to the rewriting of real estate contracts and escrow instructions by an escrow agent or by a court, and overturn Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L.ed 953, and Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F.2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246

U. S. 672, 62 L.ed 932, 38 S. Ct. 432, with respect to repudiation of contracts by making new demands. In the Equitable Trust Case, Hand, Distict Judge, said:

> To say that you will not pay as bound unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.
> (emphasis added)

(2) to compel F. M. Cocke and the trustee Bank to execute valid warranty deeds to Parcels 1A and 2A, which parcels were not part of any contract and to which neither F. M. Cocke nor the trustee Bank has ever had title.

ITEM 5

Although Buyers' Complaint, on which summary judgment by Minute Order of December 8, 1970 was granted, did not name Transamerica, it demanded that the Court order Transamerica to deliver the releases, admittedly a prerequisite to development, to Buyers upon payment of the sums entitling Buyers thereto, as provided in the agreement. As specified in Buyers' letter of instructions, the two $32,000 payments, one to Joan H. Cocke and one to F. M. Cocke, which would entitle Buyers to their first releases of mortgage, on about 8 acres in Parcel 1, had to await Items 1, 2, 3, and 4. In addition to the required procurement of the warranty deeds to Parcels 1A and 2A from F. M. Cocke and the trustee Bank,

for which no precedent exists in law, the payments for the delivery of the releases to Buyers had to await the recording of the trustee Bank's deed to the trust half-interest in Parcel 1. But Transamerica is no longer willing to record this deed because the proposed payment of the proceeds to Joan H. Cocke violates the trustee Bank's instructions. Even if Transamerica were to reassume its earlier position and decide to record such deed, and issue its title policy, the settled doctrines of Higgins v. Kittleson, and cases cited, supra, would prevent title from vesting in grantee, and the trust remaindermen would have little trouble in retaking the land.

In addition to the above two prerequisites to any development by Buyers, which were imposed by Buyers themselves in their letter of escrow instructions dated March 5, 1969, the recording of the Bank's deed is a prerequisite required by law: since the trust interest in Parcel 1 is an undivided half-interest, no valid releases of mortgage on the 8 acres in Parcel 1 can be delivered to Buyers by Transamerica until after the recording of the Bank's deed.

On January 24, 1972, Transamerica expressed before the Court of Appeals its unwillingness to close the escrow, and issue its title policies to Buyers in accordance with their new demands, notwithstanding Cocke v. Cocke and the trial judge's minute order granting Buyers' motion for summary judgment on their complaint. Transamerica mentioned to the Court of Appeals, as an amount it could lose by closing the escrow at this time, about a half-million dollars, thereby

evidencing misgivings, at least, concerning the recording of deeds and issuance of title policies on F. M. Cocke's Parcel 2 and his half-interest in Parcel 1, as well as on the trust half-interest in Parcel 1.

So far, Transamerica has made no direct statement, as it has with respect to the trustee Bank's deed, that it is now unwilling to use F. M. Cocke's two deeds because Buyers' new demands also violate the escrow instructions, agreed to by all parties, of the depositor of such deeds.

This much, however, is clear: On January 24, 1970, Transamerica was not willing to close the escrow in accordance with Buyers' new escrow instructions, and insure title against actions by F. M. Cocke and the remaindermen to retake the land, for about a half-million dollars, (1) on any theory that such closing would not violate the escrow instructions agreed to by all parties, (2) on any theory that Cocke v. Cocke and the trail judge's minute order granting summary judgment in favor of Buyers on their complaint overturned Higgins v. Kittleson, and cases cited, Goodman v. Newzona, and Mallow v. Hinde, supra, or (3) on any theory that Transamerica would be able to recover its losses by first finding and then collecting the half million dollars from among the persons responsible for the loss.

Manifestly, Transamerica is still maintaining the position held by it since March 19, 1969: it remains unwilling to comply with the escrow instructions, either the instructions agreed to by all parties, or Buyers' new escrow instructions

contained in their letter dated March 5, 1969. Transamerica therefore has remained, at its own risk, unwilling since March 19, 1969 to comply with the fine print instruction paragraph 24, which as agreed to by all parties commands return of the deeds deposited by the trustee Bank and F. M. Cocke in the event the escrow agent is unwilling to comply with the escrow instructions, or Transamerica is unwilling to issue its title policies.

IV.

THE SCHEDULED TRIAL ON DAMAGES

The trial now scheduled for February 23, 1972, has been limited by minute order to determination of the amount of damages claimed by Buyers in their Complaint to be due them for delay in their planned development, claimed by Buyers to have been caused solely by F. M. Cocke.

However, since the Court was and is without jurisdiction to proceed at all on Buyers' Complaint, except to dismiss it, the trial, to be held by the judge, will constitute merely additional abuse of process, for which the judge, not the Court, will be liable. CJS, Am Jur 2d, and Arizona and United States Supreme Court cases, supra.

ARS, Section 13-811, provides:

> A public officer or person pretending to be a public officer, who, under pretense or color of any process or other legal authority, arrests or detains a person against his will, or seizes or

> **levies** upon property, or dispossesses a person of lands or tenements, without a legal process or other lawful authority therefor, is guilty of a misdemeanor.

ARS, Section 44-1211, 2 and 3 (a), provide:

> A person is guilty of a misdemeanor who:
>
> 2. Is a party to any bond, action or judgment, or execution, contract or conveyance had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.
>
> 3. Is a party as provided in paragraph 1 or paragraph 2 of this section, and
>
> (a) At any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends such transaction as true, and had or made in good faith, . . .

See also 1 Am Jur 2d, Abuse of Process, Sections 13, 18, 19, 25, 26; Monroe v. Pape, 306 U. S. 167, 81 S. Ct. 473, 5 L. ed 492.

Further, as related above under III, Jurisdiction Over Contractural Rights and Obligations, Transamerica is evidently well aware that it is not bound by the ruling of Cocke v. Cocke that Joan H. Cocke is entitled to the trust land

proceeds, since neither trustee Transamerica, nor the trustee Bank, nor the trust remaindermen, were before the court in that case. Likewise, it is not bound by the trial judge's ruling in favor of Buyers on their demand that the Court order Transamerica to deliver the releases of mortgage to Buyers, since Buyers did not name Transamerica as a defendant. Clearly, Transamerica's unwillingness to close the escrow in accordance with Buyers' new instructions, and to insure Buyers' titles for about a half million dollars, was not prevented by Cocke v. Cocke, nor can it be cured by final judgment in favor of Buyers on their Complaint. Until Goodman v. Newzona, supra, is overturned, even a new action by Buyers against Transamerica could not rewrite paragraph 24 so as to take away the option therein granted by Buyer and Seller to the escrow agent to refuse at will (for any reason other than cancellation under 16-23) to comply with the escrow instructions, or the right of Transamerica to refuse at will to issue its title policies, the only condition attached to the exercise of either option being the mandatory return of the deeds deposited into escrow by the trustee Bank and F. M. Cocke.

Of course, it is not known at this time, at least by this defendant, whether or not Transamerica has reversed its position again since January 24, 1972 on closeing the escrow in accordance with Buyers' new instructions. However, it should not be overlooked that as of February 23, 1972, the damages claimed by F. M. Cocke, for himself and the remaindermen, for delay in return of the deeds, will still be less than one-fifth of the half million dollars Transamerica admitted it could

lose by such closing.

Even if Transamerica has again so changed its position, this defendant has as yet received no notice that the escrow has actually been closed since January 24, 1972, in accordance with Buyers' new escrow instructions, along with the necessary recording of the deeds and mortgages and the issuance of the policies insuring the titles in Buyers. Since even Buyers could scarcely claim as a matter of business practice, and even the trial judge could scarcely rule as a matter of law, that Buyers were entitled to begin their development on any part of Parcel 1 or 2 before they took possession of such part under title, not to mention the problems of the releases of mortgage, it appears that the date of any actual recording of the deeds and mortgages by the escrow agent, subsequent to January 24, 1972, and thus the beginning of any period of time during which it was possible for F. M. Cocke to cause delay in Buyers' development, must await the testimony of the escrow officer on February 23, 1970, in the event the trial be held as scheduled.

The relief demanded by Buyers' Complaint was clearly performance of less than all the mutually binding provisions of the consolidated real estate agreement and escrow agreement with Transamerica, without joining Transamerica. The cases and authorities cited and quoted above show that the Court therefore had and has no jurisdiction over the subject matter of such Complaint, and no authority to proceed on such Complaint at all, except to dismiss it. F. M. Cocke's Motion to Dismiss Buyers' Complaint and all

amendments should therefore be granted, as required by Rule of Civil Procedure 12 (i), 3.

In Industrial Commission v. Superior Court of Pima County (1967) 5 Ariz. App. 100, 423 P.2d 375, Rehearing denied, Reviewdenied, the court said:

> Affirmative defenses may be raised and determined on a motion to dismiss where the facts constituting the defense appear on the face of the complaint. Ross v. Ross, 96 Ariz. 249, 393 P.2d 933 (1964); Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), cert. denied 343 U.S. 934, 72 S. Ct. 770, 96 L.ed. 1342, rehearing denied 343 U.S. 958, 72 S. Ct. 1050, 96 L.ed. 1358 (1952).

* * *

MOTION FOR JUDGMENT ON THE PLEADINGS

Clearly, the Court has no choice, under Rule of Civil Procedure 12 (i), 3, but to dismiss Buyers' Complaint.

Further, it is not disputed (1) that F. M. Cocke's 13-day notice of intent to cancel was filed in accordance with paragraphs 16-23 of the escrow instructions, (2) that Buyers failed within the 13-day period to comply with the escrow instructions agreed to by all parties, so cancelling the escrow and requiring the return of the deeds deposited by F. M. Cocke and the trustee Bank. Still further, it is not disputed (3) that Transamerica

clearly expressed its unwillingness to issue its title policy on F. M. Cocke's Parcel 2 in March, 1969, expressed its unwillingness to issue its title policy on the trust half-interest in Parcel 1 on February 27, 1970, and on January 24, 1972 expressed its unwillingness to issue its title policies on Parcels 1 and 2, so requiring under paragraph 24 the return by the escrow agent of the deeds deposited by F. M. Cocke and the trustee Bank, because of such unwillingness to issue the title policies. But it is not disputed that (4) the escrow agent has remained unwilling to return F. M. Cocke's deeds since March, 1969, unwilling since at least February, 1970, to return the trustee Bank's deed, and unwilling since January 24, 1972, to return all of such deeds, again requiring under paragraph 24 the return by the escrow agent of the deeds deposited by F. M. Cocke and the trustee Bank, because of such unwillingness to follow the escrow instructions in paragraph 24, which were also agreed to by all parties.

It should not be forgotten that Buyers' Complaint alleged that F. M. Cocke wrongfully refused to execute partial releases of mortgages, and also that F. M. Cocke refused to execute the deed required to be executed by him. However, it is now admitted that F. M. Cocke's deeds were delivered into escrow at least a month before Buyers delivered the twenty-five releases, and that F. M. Cocke executed the releases immediately upon notice that they had been delivered to escrow, on March 5, 1969.

Pursuant to Rule of Civil Procedure

92 (c), defendant F. M. Cocke therefore moves the court for judgment on the pleading on his counterclaim against Buyers.

Respectfully submitted this
7th day of February, 1972,

JOHNSON SHELLEY ROBERTS & RIGGS

By L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for defendant
F. M. Cocke
48 North Macdonald Street
Mesa, Arizona 85201

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S ANSWER TO BUYERS' AMENDED COMPLAINT

Filed: February 22, 1972

By way of Answer to plaintiff Buyers' Amended Complaint for Specific Performance of the real estate contract and escrow instructions to Transamerica, F. M. Cocke admits, denies and alleges as follows:

Count II

I

F. M. Cocke's original Answer and Counterclaim against Buyers, filed June 23, 1969, which counterclaim Buyers answered on June 30, 1969, is incorporated herein by this reference. The real estate contract between Sellers and Buyers, and the escrow agreement with Transamerica, were consolidated into a single multi-party contract by a provision in each, thereby making Sellers' agreement to sell, and Buyers' agreement to buy, subject to all the terms and conditions of the escrow agreement with Transamerica, including the cancellation provisions, paragraphs 16-25. Paragraph 24 actually made Transamerica the dominant party to

the contract, since Buyers, as well as Sellers, thereby gave Transamerica the right to put an end to the consolidated contract without consulting either Buyer or Seller. Under paragraph 24 Transamerica had and has the right to in effect cancel the entire contract at will by (1) simply refusing as escrow agent (for any reason other than cancellation under paragraphs 16-23) to comply further with the escrow instructions, or (2) simply refusing as title insurer to issue its title policies.

II

Answering paragraph II, admits that at the time said consolidated contract was entered into Buyers mentioned apartments, but denies that this defendant was informed of a planned shopping center or of industrial development except for a buffer strip along 52nd Street. Alleges this defendant has received no notice from this City of Tempe that the property has been zoned other than single family residence, denies the remaining allegations of paragraph II.

III

Answering paragraph III, admits that Buyers, in connection with their long delayed releases must have incurred expense in connection with their planned use of the land, as did Sellers in their planned use of the money, but has no knowledge of Buyers' plans other than their descriptions of the release parcels. Alleges that any development by Buyers must await their new plans, if their earlier ones are no longer usable. Denies

that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies the remaining allegations of paragraph III.

IV

Answering paragraph IV admits that since the aforesaid consolidated contract was entered into costs of construction and many other things, including replacement of farm land, have increased and probably will continue to increase, if quoted in United States dollars. Denies that Buyers are able to predict the exact amount of future inflation. Denies that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies the remaining allegations of paragraph IV.

V

Answering paragraph V, admits that for many months since the aforesaid consolidated contract was entered into interest rates remained at a high level, but alleges that Buyers did not offer to raise the interest to be paid to Sellers under such consolidated contract. Denies the remaining allegations of paragraph V.

VI

Answering paragraph VI, denies that any delay at all in Buyers' planned development, after this defendant received notice on March 5, 1969 that their release parcel descriptions had finally been delivered into escrow, has been caused by

act or failure to act of this defendant except as provided for in said consolidated contract and thereby approved in advance by Buyers. Denies that Buyers will be able to prove at the trial the exact amount of past and future rents and profits now unknown to Buyers, as they have alleged. As an affirmative defense this defendant alleges that the attempt by Buyers and the escrow officer to secure on March 5, 1969, this defendant's signature on the warranty deed to Parcel 2A and a half-interest in Parcel 1A, which parcels Buyers and the escrow officer well knew were not part of any contract and to which parcels Buyers and the escrow officer well knew this defendant did not have title, which attempt was ratified and confirmed by Buyers' written demand for warranty deeds to such Parcels contained in their letter of escrow instructions dated March 5, 1969, was for the purpose of delaying the escrow, to forestall the accrual of interest on the balance due at about $85,00 per day. Alleges that by such attempt and demand, not yet retracted, Buyers repudiated the consolidated contract. Denies the remaining allegations of paragraph VI.

VII

Denies that plaintiff Buyers have paid, or have agreed since March 5, 1969 to pay, the amounts provided in the consolidated contract to be paid by Buyers. Denies that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies that Buyers' alleged additonal costs and loss

of use of money was or is due to any failure of this defendant to comply with the escrow instructions approved by all parties to the consolidated contract. Denies the remaining allegations of paragraph VII.

VIII

Answering paragraph VIII admits plaintiffs have employed attorneys, but denies that such employment was necessary or was occasioned by any failure of this defendant to comply with the terms and conditions of the consolidated contract. Denies the remaining allegations of paragraph VIII.

IX

Answering paragraph IX, admits, as alleged, that Buyers have never taken possession of the subject property. Alleges that Buyers' failure to take possession has been and now is still occasioned by the continuing unwillingness of Transamerica to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new demands, which were not part of any contract. Denies the remaining allegations of paragraph IX.

That by way of affirmative defense, this defendant alleges as follows:

No longer ago than January 24, 1972, Transamerica expressed to the Court of Appeals its continued unwillingness to (a) close the escrow by cancelling the consolidated contract in compliance with the escrow instructions agreed to by all

parties, or to (b) close the escrow and deliver the deeds and its title policies to Buyers in compliance with Buyers new escrow instructions contained in their letter to the escrow agent dated March 5, 1969.

That on January 24, 1972, then, Transamerica had not yet delivered, and remained unwilling to deliver, the deeds and title policies to Buyers upon the terms and conditions specified by Buyers in their new set of escrow instructions. Obviously, there has been no delay due to "failure to convey" in accordance with the consolidated real estate contract and escrow instructions on the part of this defendant. That the delay, if any, repeatedly alleged by Buyers in their amendment as caused by "defendants' failure to convey", has been delay caused by Transamerica's failure to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new demands. That it is Transamerica, not this defendant, which as escrow agent now holds the deeds in escrow, and which as title insurer is unwilling to insure title in Buyers, since unwilling to risk about a half million dollars on such title insurance on Buyers' theory that to close the escrow in accordance with their new escrow instructions would not violate the escrow instructions earlier agreed to by all the parties.

It has been this unwillingness on the part of Transamerica to deliver the deeds and title policies to Buyers, not any act or failure to act of this defendant, that has kept the agreement in the executory stage, since Buyers have never been able

to take legal possession of the subject property under valid deed and insured title. Unless and until Buyers have taken legal possession, any attempt at construction would, of course, constitute merely trespass.

X

That as affirmative defense this defendant further alleges:

Buyers' original Complaint alleged that F. M. Cocke wrongfully refused to execute partial releases of mortgages, and also that F. M. Cocke refused to execute the deed required to be executed by him. However, it is now admitted that F. M. Cocke's deeds were delivered into escrow at least a month before Buyers delivered the twenty-five releases, and that F. M. Cocke executed the releases immediately upon notice that they had been delivered to escrow, on March 5, 1969.

That pursuant to Rule 15b of the Rules of Civil Procedure, the plaintiffs' complaint should have been amended to conform to the above undisputed evidence.

XI

That as a further affirmative defense this defendant points out that Transamerica Title Insurance Company has never been joined as a defendant in plantiffs' action for specific performance and consequently this Court has no jurisdiction over the subject matter of plaintiffs' complaint.

Respectfully submitted this
22nd day of February, 1972,

JOHNSON SHELLEY ROBERTS & RIGGS

By L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for defendant
F. M. Cocke
48 North Macdonald Street
Mesa, Arizona 85201

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

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| JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim. | No. C-222472<br><br>F. M. COCKE'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW<br><br>Filed: February 23, 1972 |

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by Buyers to have been wholly

caused by F. M. Cocke, could have accrued. This request is an addition to F. M. Cocke's Request for Findings of Fact and Conclusion of Law filed January 17, 1972, and will therefore begin with number "5".

5. As a matter of fact and law, whether or not F. M. Cocke promised to convey title to Buyers except upon the terms and conditions contained in the consolidated real estate contract and escrow agreement with Transamerica and in the trustee Bank's instructions, and if so, by what instrument, and the date thereof.

6. As a matter of fact and law, whether or not the attempt on March 5, 1969 by Buyers and the escrow officer to secure F. M. Cocke's signature on the deed which included Parcels 2A and a half-interest in Parcel 1A was in accordance with the consolidated contract or any other contract.

7. As a matter of fact and law, whether or not under the consolidated contract F. M. Cocke was bound to secure the zoning for the various uses proposed by Buyers, and whether or not construction of apartments, shopping center and industrial buildings could begin without a change in the zoning of the subject property.

As a matter of fact, if Buyers' earlier plans for development are no longer usable, as alleged by Buyers, whether or not any development by Buyers must await their new plans.

8. As a matter of fact and law, whether Transamerica or F. M. Cocke was, under the consolidated real estate

contract, and escrow agreement, the escrow agent and title insurer chosen by Seller and Buyer, and, if Transamerica, whether or not it was charged with the duty of the safekeeping and delivery, or redelivery or return, of the deeds delivered into escrow by the trustee bank and F. M. Cocke, all in accordance with the terms and conditions expressed in the consolidated contract of October 9, 1968 and with the terms and conditions expressed in the letter of instructions from the trustee Bank accompanying the delivery into escrow of its deed about October 25, 1969.

9. As a matter of fact and law, whether or not by paragraph 24 of the printed escrow form Buyers as well as Sellers gave Transamerica the right as escrow agent to put an end to the entire consolidated contract without consulting either Buyers or Sellers by (1) simply refusing as escrow agent (for any reason other than cancellation under paragraphs 16-23) to comply with the escrow instructions, or (2) simply refusing as title insurer to issue its title policy.

10. As a matter of fact and law, whether or not Transamerica was on January 24, 1972 and February 22, 1972 willing to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new set of escrow instructions contained in their letter dated March 5, 1969.

11. As a matter of fact and law, the specific act or failure to act of F. M. Cocke, if any, which caused the claimed delay in Buyers' development, and the date thereof, and whether or not such act or failure to act was in accordance

with the consolidated contract and the trustee Bank's escrow instructions and therefore approved in advance by Buyers.

12. As a matter of fact and law, the specific provision of the consolidated contract or of the trustee Bank's escrow instructions which provided for or approved items (1), (2), (3), (4), and (5) of 4a above, as required by Buyers' letter of escrow instructions dated March 5, 1969.

13. As a matter of fact and law, whether or not Buyers were legally in a position to begin construction before taking legal possession of the subject property under valid deed and insured title.

Respectfully submitted this 23rd day of February, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for defendant
F. M. Cocke
48 North Macdonald Street
Mesa, Arizona 85201

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

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| JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim. | No. C-222472<br>F. M. COCKE'S ADDITIONAL REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW<br>Filed: February 28, 1972 |

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by

Buyers to have been wholly caused by F. M. Cocke, could have accrued. This request is an addition to F. M. Cocke's Request for Additional FIndings of Fact and Conclusions of Law filed February 23, 1972, and will therefore begin with number "14."

14. As a matter of fact and law, whether (1) Transamerica, as escrow agent and therefore a trustee, (2) the trustee First National Bank of Arizona, or (3) the trust remaindermen, not being before the court in Cocke vs. Cocke, are bound by any part of the decision therein made.

15. As a matter of fact and law, whether (1) Transamerica, as escrow agent and therefore as trustee, (2) the trustee First National Bank of Arizona, or (3) the three trust remaindermen are bound by the trial judge's ruling in favor of Buyers on their complaint for specific performance of the consolidated contract, and subject to further orders of the trial judge in connection with such ruling.

Respectfully submitted this 28th day of February, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for defendant
F. M. Cocke
48 North Macdonald Street
Mesa, Arizona 85201

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation, M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

DEFENDANT F. M. COCKE'S REJOINDER TO PLAINTIFFS' REPLY OF JULY 26, 1972,
and
DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SECOND AMENDED JUDGMENT LODGED JULY 26, 1972.

Filed: August 1, 1972

REJOINDER TO PLAINTIFF BUYERS' REPLY OF JULY 26, 1972

I.

In their Reply Plaintiff Buyers state that with their Second Amended Judgment and Amended Findings of Fact "all complaints of substance made by Defendant F. M. Cocke are dispelled," but the accuracy of such statement is not conceded by F. M. Cocke.

Buyers themselves also state that in F. M. Cocke's objections to Plaintiffs' Amended Judgment he sought to raise old arguments which time and again have been conceded and have been rejected by the Court. Since it is beyond the province or power of the Court to rewrite the actual agreement entered into by the parties, specific performance of which was granted December 8, 1970, or rewrite Buyers' letters of March 5 and

March 26, 1969, or rewrite several of the Rules of Civil Procedure, as proposed by Buyers, the Amended Judgment and the Second Amended Judgment are beyond the province or power of the Court, for the reasons set forth in F. M. Cocke's Objections I through VII to such proposed Judgments. Both of the Amended Judgments are based on an impliedly alleged but nonexistent agreement by Sellers "to convey" regardless of Buyers' admitted failure to perform as agreed.

It should not be overlooked that none of plaintiff Buyers' papers filed July 26, 1972, were verified.

DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FORM OF SECOND AMENDED JUDGMENT LODGED JULY 26, 1972

Inasmuch as plaintiff Buyers' Amended Proposed Findings of Fact and Conclusions of Law as separately filed (except for Findings Nos. 9, 10, 11 and 14) are incorporated into their proposed Second Amended Judgment, defendant F. M. Cocke's objections to all such Findings and Conclusions are incorporated into the following objections to the form of such proposed Judgment lodged July 26, 1972. In Findings of Fact Nos. 9, 10, 11, and 14, the words "perform the agreement for the purchase and sale and," which are included in the Amended Judgment and in the Second Amended Judgment, are omitted in the Amended Proposed Findings separately filed.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH THE COURT'S

MINUTE ORDER GRANTING SPECIFIC PERFORMANCE

A first and fundamental objection to the proposed Judgment is that it is in violent conflict with the Court's Minute Order of December 8, 1970, granting specific performance of the consolidated real estate and escrow agreement, a copy of which was attached by plaintiff Buyers to their original Complaint as a part thereof. It is obvious, as pointed out in the following subparagraph No. 1, that Buyers are now attempting to establish that the consolidated real estate and escrow agreement entered into by Sellers, Buyers, and Transamerica, for the sale and purchase of the land, included a provision that Sellers were to convey the land to Buyers regardless of the admitted failure of Buyers to comply with the terms of the agreement. However, Buyers' new position is clearly untenable, since there is no way to read such a provision into the agreement. A copy of the actual agreement entered into, the specific performance of which was sought by Buyers and granted by the Court, is attached hereto as Exhibit A.

1. The proposed Second Amended Judgment refers in Findings of Fact Nos. 9, 10, 11, and 14, and in Conclusion of Law No. 2, to F. M. Cocke's failure or refusal "to convey".

But where is the provision, express or implied, by which either of the Sellers agreed "to convey" any land at all to Buyers except upon performance by Buyers of their obligations?

The answer to this question is that there was and is no such provision, and

that the actual agreement entered into, which was the agreement the specific performance of which was granted by the Court, required of Sellers only that they deliver their deeds into escrow, which they did long before Buyers saw fit to even partially comply by delivering their release description into escrow for Sellers' signatures.

The first paragraph of the preliminary agreement specifies:

> THIS AGREEMENT made and entered into this 9th day of October, 1968, between JAMES STEWART COMPANY, Buyer, and JOAN H. COCKE and FRANCIS M. COCKE, Sellers, and together with that certain Escrow Agreement No. 02013111-7 entered into with Transamerica Title Insurance Company, signed by the same parties, a copy of which is attached hereto and by reference made a part hereof, constitutes the full agreement between the parties for the purchase and sale of approximately 124 acres of land, being that part of the SE 1/4 of Section 20, Township 1 North Range 4 East, G&SRB&M, lying north of the right-of-way of the Jenkins Ditch, Except a parcel of 3-5 acres containing certain improvements of the Seller Francis M. Cocke situated at the northeast corner of the property, north of the George Ditch.

Schedule A, attached to the escrow agreement, or escrow instructions, as a part thereof, includes:

> These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

Paragraphs 1 and 7 of the fine print escrow instructions specify that:

> SELLER:
> 1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
>
> SELLER AND BUYER:
> 7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

It is clear from the above provisions (1) that the proposed sale and purchase was subject to its consummation under the terms of the escrow agreement, (2) that Sellers were bound only to deliver their deeds into escrow, and (3) that delivery thereof was to be made by the escrow agent to Buyers upon actual performance by them (not merely expressions of willingness to perform) of the terms of the escrow agreement. It is well settled that expressions by a party to an escrow agreement of willingness and ability to comply with the escrow

instructions are immaterial to the question of actual compliance. 28 Am Jur 2d 13, Escrow, Sections 21, 22, 24. The ability of a party to perform the escrow agreement cannot, without actual full performance, amount to compliance. 30A CJS, Escrows, Sections 10(a) and 10(b), and cases cited.

Under the heading CANCELLATION, fine print paragraphs 16-22 include:

> CANCELLATION:
> 16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.
>
> 17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notice of Demands or Declarations.
>
> 18. In the event said other party shall fail within said thirteen-day period to comply with all of the terms hereof, these instructions

shall become cancelled and Escrow Agent is thereupon authorized;

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid:

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of the Escrow Agent. (emphasis added)

It is not disputed that on March 5, 1969 F. M. Cocke filed his 13-day notice of election to cancel upon the continued failure of Buyers to comply, as provided for by paragraphs 16-22. Nor is it disputed that Buyers have never complied.

Under the heading CANCELLATION, fine print paragraph 24 specifies:

CANCELLATION:
24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title

> Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents.
> Mutually executed instruments shall be retained by Escrow Agent.

Upon Transamerica's unwillingness to issue its title policies, which unwillingness has been exhibited by it for nearly three years, and was specifically admitted before the Court of Appeals, the escrow was clearly cancelled, as agreed to in advance by Buyers, under the self-executing and mandatory language of fine print paragraph 24.

It is well settled that where a contract states grounds upon which a party may rescind or cancel it, the contract controls as to such grounds.
17 Am Jur 2d 969, Contracts, Section 495.

Under the heading DEFINITIONS, fine print paragraph 43 specifies:

> DEFINITIONS:
> 43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

This paragraph makes it clear that since

only Transamerica could make the decision that it would issue its title policy, only Transamerica could close the escrow, which was the relief sought by Buyers' action for specific performance. But since Buyers failed to join Transamerica, they left the Court without jurisdiction to grant such relief, as further discussed under IV, below.

II.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH THE UNDISPUTED FACTS

1. At page 3, line 25, in Finding of Fact No. 4, Buyers admit that the agreement provided that the unpaid balance was to be secured by plaintiffs' notes and mortgages, but omit the undisputed fact that in Buyers' letter dated March 5, 1969 they demanded that the escrow agent close the escrow and record the deeds to Buyers, subject to mortgages to be simultaneously recorded totalling $84,000 less than the balance due, as discussed below under subparagraph 3.

2. Finding of Fact No. 6 fails to mention the undisputed fact that Buyers took back, and still hold, the $20,000 earnest money paid to Sellers upon the signing of the contract, by Buyers' removal from the escrow officer's desk, and their continued retention of, the $40,000 note and mortgage deposited into escrow by F. M. Cocke on or about January 10, 1969, in exchange for and as double security for the $20,000 in escrow funds received by him at that time.

3. In Finding of Fact No. 7,

plaintiff Buyers state that they have been ready at all times to close this transaction since December 15, 1968.

However, it is not disputed that, as mentioned above, Buyers' 25 release descriptions were not made available for F. M. Cocke's signature until March 5, 1969.

Nor is it disputed that by Buyers' letter of instructions to the escrow agent dated March 5, 1969, they made a number of new demands, all of which were and are in conflict with the terms of the escrow agreement.

It is not disputed that Buyers' letter instructed the escrow agent to:

(1) Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the delivery of its deed into escrow in October, 1968.

(2) Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

(3) Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

(4) Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers. Neither the trustee Bank nor F. M. Cocke ever executed any deeds to

Parcels 1A or 2A, either quit-claim or warranty, since neither had title. Such parcels were for that reason specifically excluded from the land agreed to be sold, and were not the subject of any contract.

In a second letter to the escrow agent dated March 26, 1969, Buyers claimed that the position taken by them in their letter of instructions to the escrow agent dated March 5, 1969 amounted to compliance. Marked copies of these letters are attached as Exhibit B.

Further, it is not disputed that Buyers have never retracted these new demands, which constituted a repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 432, Hand, District Judge, said:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. This is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

4. In Finding of Fact No. 8, plaintiffs state that defendant Joan H. Cocke has been ready to perform since December 15, 1968 and thereafter.

However, it is not disputed that Joan H. Cocke joined with F. M. Cocke in

instructing the trustee Bank, by the letter dated October 10, 1968, prepared by her attorney, to deliver into escrow its trustee's deed to the half-interest then held by it in Parcel 1 along with the instruction to the escrow agent that the proceeds therefrom would be controlled by Joan H. Cocke and F. M. Cocke. Neither is it disputed, as testified to by Joan H. Cocke's attorney, Loretta Whitney, that in February, 1969, Joan H. Cocke repudiated her agreement as to joint control of such proceeds. Nor is it disputed that she was joined by Buyers and the escrow agent in the unsuccessful attempt to in effect rewrite the trustee Bank's escrow instructions, earlier approved by all parties, so as to delete the specification contained therein as to joint control, and pay such proceeds to Joan H. Cocke.

5. In Findings of Fact Nos. 9, 10, 11, and 14, Buyers speak of F. M. Cocke's refusal or failure to perform the agreement for purchase and sale, but have never specified the particular act or failure to act which constituted such claimed refusal or failure. It is not disputed that, in accordance with fine print paragraph 1 of the escrow instructions (discussed above), F. M. Cocke's deeds to Parcel 2 and the half-interest in Parcel 1 were timely delivered into escrow. Such deeds contain the same Brown Engineering land descriptions which Buyers now approve on pages 1 and 2 of their proposed Second Amended Judgment, except that Buyers have omitted the clause subjecting the land to rights of way for roads, ditches and public utilities.

6. Buyers have never offered one shred of evidence that their claimed "preliminary costs," mentioned in Findings of Fact Nos. 11 and 12, and Conclusion of Law No. 2, were within F. M. Cocke's contemplation at the time the agreement was entered into. It is undisputed that it was Buyers themselves who chose to incur their claimed preliminary costs and then refused to perform as agreed by insisting on the new demands made in their letter dated March 5, 1969.

7. In Finding of Fact No. 13, Buyers admit that on December 8, 1970, the Court granted specific performance of the consolidated agreement entered into on October 9, 1968, by Sellers, Buyers and Transamerica, a copy of which was attached to Buyers' Complaint for Specific Performance, and a copy of which is also attached to these Objections. The Court granted specific performance of the agreement, not Buyers' letter dated March 5, 1969.

As pointed out in Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764, one of the cases relied on by Buyers in their Post Trial Memorandum:

> Equity enforces performance of a contract only as it is made; a court has no power to make a new contract.

III.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULES OF CIVIL PROCEDURE 12(b)7, 19(a) and 19(c), AS AMENDED, CONCERNING INDISPENSABLE PARTIES

It is clearly not within the province

or power of the Court to rewrite the actual agreement entered into by Sellers, Buyers, and Transamerica so as to alter any of its provisions or take out either a provision or a party. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, infra. Since an escrow agent is undeniably an indispensable party to an escrow agreement, it must follow that Transamerica remains under the terms of the escrow agreement actually entered into an indispensable party to any adjudication of the mutual rights and obligations of Sellers and Buyers under such escrow agreement.

It is clear that the 1969 amendment to Rule 19 did not relax the rule where joinder of the additional party, needed for just adjudication between those already joined is feasible.

In Provident Tradesman's Bank & Trust Co. v. Patterson, 390 U.S. 102, 19 L.ed 2d 936, 88 S. Ct. 733 (January, 1968), in discussing Rule 19 and cases relied on by the lower court in dismissing a complaint in the absence of an indispensable party, the court said at page 951 of 19 L.ed 2d:

> The first of the cases was Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599, in which, in essence, the plaintiff sought specific performance of a contract to convey land, but sought it not against his vendor (who could not be joined) but against a person who claimed through an entirely different chain of title. The Court saw that any declaration of rights between the parties before it would either

purport (incorrectly) to determine the validity of plaintiff's contract with his grantor, or would decide nothing. The Court said, in language quoted here by the Court of Appeals:

'In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . . We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . . We put it on the ground that no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.'

Nothing in this language is inconsistent with the Rule 19 formulation, or otherwise suggests that lower courts are expected to proceed without examining the actual interest of the nonjoined person. As the Court explicitly stated, there is no question of "jurisdiction" and there can be no binding adjudication of a person's rights in the absence of that person. Rather, the problem under the circumstances was that the substantive involvement of the grantor was such that in his absence there was nothing for the Court to decide.
(emphasis added)

In Mallow v. Hinde, as in this instant case, executory agreements were before the court, but, also as in this case, without all of the parties whose mutually dependent rights and obligations would have to be determined. In Mallow v. Hinde, the court upheld dismissal of the complaint, even though the absent party could not be joined.

As pointed out in the Provident Tradesman's case, there was nothing in the language quoted from Mallow v. Hinde that was inconsistent with the Rule 19 formulation, or otherwise suggested that lower courts are expected to proceed without examining the actual interest of the nonjoined person.

IV.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULES OF CIVIL PROCEDURE 12(b) 6 and 12(b) 1

Since the escrow agent was not joined by Buyers, their Complaint seeking specific performance of the consolidated agreement failed to state a claim upon which the relief sought could be granted, such relief requiring jurisdiction over the escrow agent in order to enforce the obligations assumed by it. Without the jurisdiction to grant the relief sought, the Court was and is left without jurisdiction over the subject matter of Buyers' Complaint. 21 CJS, Courts, Sections 26, 35b; Cooper v. Reynolds, 10 Wall 308, 316, 19 L.ed 931. A court cannot render a valid judgment without jurisdiction to grant the relief sought. 49 CJS, Judgments, Sections 19a, 19c, 19d; Varnes v. White, 40 Ariz. 427, 12 P.2d 879; Wall v. S. Ct. of Yavapai Co.,

53 Ariz. 344, 89 P.2d 624; Hill v. Favour, 52 Ariz. 561, 84 P.2d 575; Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 P. 251; Western Land & Cattle Co. v. National Bank of Arizona at Phoenix, 29 Ariz. 51, 239 P. 299.

V.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULE OF CIVIL PROCEDURE 52(a) PROVIDING FOR MANDATORY FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 17, February 23, and February 28, 1972, this defendant requested findings of fact and conclusions of law as provided by Rule of Civil Procedure 52(a).

In their proposed Second Amended Judgment, plaintiff Buyers have ignored such requests, in violation of Rule 52(a). All of these requests were made before trial, which began February 28, 1972, at 10:09 a.m.

VI.

NO COURT ORDER TO CONVEY

Any statements in Finding of Fact No. 14, or elsewhere, that F. M. Cocke was ordered to convey by the Court, are in error. What was ordered by Minute Order of December 8, 1970 was specific performance of the consolidated real estate and escrow agreement, including its provisions for cancellation under fine print paragraphs 16-22 and 24.

VII.

THE PROPOSED SECOND AMENDED JUDGMENT IS BEYOND THE JURISDICTION OF THE COURT

The Second Amended Judgment proposed by plaintiff Buyers in effect rewrites the actual agreement entered into, as admitted by the judgment itself at page 9, line 1, thereof. Buyers propose the deletion from the actual agreement of the rights and duties assumed thereunder by Transamerica, which deletion, like the insertion of a provision requiring Sellers "to convey," is not within the province or power, or jurisdiction, of the Court.

As pointed out in a unanimous decision by the Supreme Court, sitting en banc, in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, re-write or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc., v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

Included in Buyers' proposed deletion are fine print paragraphs 1, 7,

16-22, 24 and 43 of the fine print escrow instructions, which are quoted hereinabove, beginning at page 4. Paragraphs 1 and 7 will bear repeating here:

> SELLER:
> 1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
>
> SELLER AND BUYER:
> 7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

It cannot be denied that the intent of Sellers, Buyers and Transamerica is here expressed in clear and unambiguous language. Paragraphs 16-22, 24, and 43 are equally clear.

In proposing the deletion of these paragraphs, and others, Buyers are asking the Court to go beyond the limits of its power or jurisdiction, and so beyond the limits of due process. In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S. Ct. 236, the court pointed out, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S. Ct. 1108, that no judgment of a court is due process of law, if rendered without jurisdiction in the court.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
Attorneys for F. M. Cocke

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

FRANCIS M. COCKE being first duly sworn, on oath deposes and says:

That he is one of the defendants in the foregoing entitled and numbered cause; and that he has read the foregoing instrument and knows the contents thereof, and that the matters and things stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ Francis M. Cocke

Subscribed and sworn to before me this 1st day of August, 1972.

/s/ Irene Millsaps
Notary Public

My Commission Expires:

9-30-75

BUYERS' REPLY TO DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SECOND AMENDED JUDGMENT LODGED JULY 26, 1972

ORAL ARGUMENT REQUESTED

Filed: August 2, 1972

Defendant Cocke's memorandum of objections to Plaintiffs' Second Amended Judgment again raises old arguments which, time and again, have been considered and rejected by the Court. Nothing gainful would be accomplished by repeated rebuttal of those copious arguments.

Respectfully submitted,

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, AND THE JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 10, 1972

Comes now defendant-counterclaimant F. M. Cocke and moves the Court to vacate the Summary Judgment of November 10, 1970, in favor of Transamerica, and to vacate the Summary Judgment of September 29, 1972, in favor of plaintiff Buyers, such judgment being void for want of jurisdiction in the Court, for the reasons set forth below.

I.

THE MULTI-PARTY ESCROW AGREEMENT

On October 9, 1968, Sellers, Transamerica as escrow agent, and Buyers entered into an escrow agreement for the proposed sale and purchase through the escrow of two parcels of land, designated as Parcels 1 and 2. The provisions of Transamerica's printed escrow form are parts of the agreement. Schedule A, attached to the printed form as part of the agreement, specifies:

These instructions and that certain

> Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

The printed escrow form includes the following provisions:

Paragraph 1 provides:

> SELLER:
> I. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
> (emphasis added)

Paragraph 14 provides:

> SELLER AND BUYER:
> 14. Direct that when these instructions have been complied with and Transamerica Title Insurance Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver for filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein at which time Escrow Agent shall disburse all funds paid to it hereunder, as

provided herein.

Paragraph 43 provides:

43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

The printed form also includes the following provisions:

Paragraph 7 provides:

SELLER AND BUYER:
7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon therafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

And under the heading "CANCELLATION":

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the

party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all of the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized: . . .

24. If Escrow Agent is unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent.

(emphasis added)

Undeniably, the whole thrust of the escrow agreement, as plainly spelled out therein, was the delegation by Buyers and Sellers to the escrow agent, and the

assumption by the escrow agent, of the right and duty either (1) to close the escrow and deliver the deeds and title policies to Buyers upon performance by Buyers under paragraph 1, 14 and 43, or (2) to cancel the escrow upon Buyers' failure to perform, under paragraphs 16, 17 and 18, or, under paragraph 24, upon the escrow agent's unwillingness to perform or Transamerica's unwillingness to issue the title policies.

The courts insist on the strict performance of an escrow agent's duties by the escrow agent itself. It is well settled that Transamerica as escrow agent was and is absolutely bound to perform, as a trustee, the duties delegated to it by Sellers and Buyers and voluntarily assumed by it, as spelled out by the escrow agreement and instructions.

28 Am Jur 2d, Escrow, in Section 16 discusses the duties and liabilities of an escrow agent, and points out that:

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed.

As briefly stated in Higgins v. Kittleson, 1 Ariz. App. 244, 401 P.2d 412 (1965):

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co.

> v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).

As stated in Tucson Title Insurance Co. v. D'Ascoli:

> An escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.

II.

THE ATTEMPT TO SECURE A WARRANTY DEED TO LAND NOT OWNED BY SELLERS

After delivery into escrow, by the broker, of F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1 on or about December 31, 1968, the close of escrow was delayed solely by Buyers' continued failure to complete their descriptions of the 25 five-acre releases of mortgage provided for by Schedule A of the agreement. These 25 releases were finally completed and delivered into escrow, and were submitted by the escrow officer, at the escrow office, to F. M. Cocke for his signature on March 5, 1969. He signed the 25 releases, but refused to

sign the 26th document in the stack submitted to him. This last document was a warranty deed which included Parcels 1A and 2A, a long narrow strip of land containing a large drainage canal, the Jenkins Ditch, which abuts the south boundary of Parcels 1 and 2, and provides drainage. The Cockes had never acquired title to the land in the canal right of way. It was for that reason specifically excepted from the land proposed to be sold, by the property descriptions attached to the escrow agreement, and was not the subject of any contract. Upon questioning, the escrow officer stated that Buyers had prepared and delivered the deed into escrow for his (F. M. Cocke's) signature along with the releases. F. M. Cocke thereupon signed and delivered into escrow, on a form furnished by the escrow officer, a notice of intention to cancel as provided by paragraph 16 of the escrow agreement.

III.

BUYERS' LETTER OF NEW DEMANDS
NOT PART OF THE AGREEMENT

It is not disputed that the Buyers' letter dated March 5, 1969, to Transamerica as escrow agent, and enclosing two personal checks for $32,000 each, dated March 7, 1969, and notes and mortgages totalling about $420,000, directed the escrow agent to:

ITEM 1. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the

delivery of its deed into escrow in October, 1968.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, as the annual payment which entitled Buyers to their first releases.

By letter of March 10, 1969, the escrow agent enclosed a copy of Buyers' letter dated March 5, 1969, and announced to Sellers that Buyer had done everything required of him to close the escrow.

The documents and demands contained in Buyers' letter to the escrow agent dated March 5, 1969, plainly show that the letter constituted a written refusal by Buyers to comply with the terms set forth in the escrow agreement. In a second letter to the escrow agent dated March 26, 1969, Buyers claimed that the deposit of such documents and demands met all requirements on the part of Buyers. Clearly, Buyers did not even attempt to comply with

the actual terms of the escrow agreement within the 13-day period following the filing on March 5, 1969, of F. M. Cocke's notice of intention to cancel. Buyers have never retracted their new demands in the manner required by paragraph 11, or in any other manner. Further, Buyers' insistence that such new demands be met, as a condition to close of the escrow, constituted, without more, a repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F.2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 432, Hand, District Judge, said:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. This is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

IV.

BUYERS' FAILURE TO JOIN THE ESCROW AGENT

This litigation began with plaintiff Buyers' Complaint, filed in April, 1969, as C-222472, For Specific Performance of the escrow agreement, a copy of which was attached to the Complaint. The Complaint itself admits the delegation to and assumption by Transamerica of the escrow agent's duties, by demanding that the

title insurance policies be issued, that the escrow be ordered closed, and that Transamerica be ordered to release the mortgages on the five-acre tracts upon future payments as provided. Notwithstanding these demands, Buyers failed to join Transamerica as a party to their action, so leaving the Court without jurisdiction to grant the relief sought and so without jurisdiction over the subject matter of Buyers' Complaint, requiring its dismissal under Rule 12 (i) 3, as amended. Cooper v. Reynolds, 10 Wall (U.S.) 308, 316, 19 L.ed 931; 21 CJS, Courts, Sections 26 and 35(b).

It is not disputed, nor could it be, that only a single multi-party escrow agreement was entered into by the parties.

An examination of Schedule A and the printed portion of the escrow agreement establishes beyond question that Seller, Escrow Agent, and Buyer were and are each an indispensable party to such escrow agreement, and that their rights and obligations were and are mutually dependent. In the absence of any one of such three parties, there could have been no escrow agreement at all between the other two. Likewise, in the absence of any one of such parties, ther could be no enforcement of such mutually dependent rights and obligations by a court. Rules of Civil Procedure 19(a) and 19(c), as amended. Provident Tradesman's Bank and Trust Co. v. Patterson, 390 U.S. 102, 19 L.ed 2d 936, 88 S. Ct. 733 (Jan., 1968); Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599; State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936); Bolin v. Superior Court, Maricopa County (1959)

85 Ariz. 131, 333 P.2d 295; Siler v. Superior Court, Coconino County (1957) 83 Ariz. 49, 316 P.2d 296.

For these reasons, pursuant to amended Rules 13(a), 13(h), and 18(a), and with leave of court first obtained, F. M. Cocke brought in Transamerica as escrow agent, seeking enforcement of the cancellation provisions of the escrow agreement. Transamerica then counterclaimed in C-222472 against F. M. Cocke, seeking attorney fees by enforcement of paragraphs 8, 9, and 10 of the escrow agreement without regard to its obligations to Buyers and Sellers to either close or cancel the escrow.

V.

SEPARATE PROCEEDINGS FOR ENFORCEMENT OF THE SINGLE ESCROW AGREEMENT

As shown by the record of C-222472, this Court on November 10, 1970, entered its separate summary judgment in favor of the escrow agent, and on December 8, 1970, entered its minute order that Buyers' motion for summary judgment on their Complaint For Specific Performance of the escrow agreement was granted. Following separate proceedings, the separate summary judgment in favor of Buyers was entered on September 27, 1972.

It must be concluded that by the separate summary judgments in favor of the escrow agent and the Buyers, the Court has attempted to alter the single escrow agreement into two separate and independent agreements, one between F. M. Cocke and the escrow agent, and another between F. M. Cocke and the Buyers. This was

completely beyond the Court's jurisdiction.

It has long been settled that a multi-party contract containing mutual convenants on behalf of each party, such as the escrow agreement, cannot be specifically enforced by one party thereto against only one other party thereto, since that would require rewriting the contract. 81 CJS, Specific Performance, Sections 1, 26, 158; 49 Am Jur, Specific Performance, Sections 2, 22, 157, 171.

In Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967), the case relied on by Transamerica to support its claims under paragraphs 8, 9, and 10, the court said:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc., v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is not need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

In Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764, one of the cases relied on by Buyers, the court briefly stated the universal rule as follows:

> Equity enforces performance of a contract only as made; a court has no power to make a new contract.

49 Am Jur, Specific Performance, Section 171, states:

> In rendering a decree of specific performance, the court has no power to decree performance in any other manner than according to the agreement of the parties. The court should not assume to make a new contract for the parties and then decree its specific performance, or undertake to compel the defendant to do something he did not contract or agree to do, but should enforce the contract in question according to its terms or not at all. Specific performance will not be decreed of something which a party has not agreed to do, in spite of the fact that it is deemed essential to the complete attainment of the benefits or advantages anticipated as a result of the contract.

Clearly, the Court was without jurisdiction to rewrite the escrow agreement so as to delete therefrom Transamerica's obligation as escrow agent to either close or cancel the escrow, and enforce only its claimed rights under paragraphs 8, 9, and 10 of the same agreement.

Further, paragraph 8 itself specifies the time limit within which the escrow agent was authorized by Buyers and Sellers, in the event a demand was made upon it concerning the escrow, to hold the money and documents deposited into escrow without incurring liability and responsibility

for damage suffered by Buyers and Sellers from the delay. Paragraph 8 provides:

> SELLER AND BUYER:
> 8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.
>
> (emphasis added)

The record shows that such a demand was made by Buyers in their letter of new escrow instructions dated March 5, 1969, and by F. M. Cocke on or about April 3, 1969. Even so, paragraph 8 clearly does not relieve the Escrow Agent of liability and responsibility for holding the money and documents from and after June 23, 1969, when the required action to determine the rights of Seller and Buyer was filed, inasmuch as the escrow agent has not yet deposited the money and documents into court as specified. Obviously, the escrow agent is liable for all damages resulting from this deviation from the terms of the escrow agreement. Tucson Title Insurance Co. v. D'Ascoli, supra.

Since the trial court was also without jurisdiction to extend the time limit specified by paragraph 8, it is clear that the separate summary judgment in favor of the escrow agent was and is a nullity, and that the appellate courts therefore lacked jurisdiction to review it. Quiroz v. Alfaro, No. 2 CA-CIV 1276; Riley v. County of Cochise, 10 Ariz. App. 55, 455 P.2d 1005 (1969). See also Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965) 341 F.2d 514.

Since the escrow agent's obligations under the escrow agreement cannot be deleted, the Summary Judgment of November 10, 1970, was plainly premature. It should have awaited a final judgment which specifies whether the escrow agent is to close or cancel the escrow, with findings of fact and conclusions of law as to whether or not the documents and demands contained in Buyers' letter dated March 5, 1969, constituted compliance by Buyers, and should also have awaited a determination of the damages suffered by Buvers and Sellers by reason of the escrow agent's delay, in closing or cancelling the escrow, beyond the time limit specified by paragraph 8. Clearly, the escrow agent could relieve itself of liability and responsibility, for holding the money and documents beyond the time limit, only by delivering same either to the court, or, by closing or cancelling the escrow, to Buyers and Sellers. Transamerica has so far chosen to do neither.

In F. M. Cocke's affirmative actions to enforce the escrow agreement, he joined both the escrow agent and the Buyers,

as required by Rule 19 discussed above under IV.

The question of whether parties to a multi-party contract, such as the escrow agreement, can separate the enforcement of its mutually binding covenants into separate controversies, with separate judgments, has arisen innumerable times following attempts by one of such parties to remove part of the case from a state to a federal court on the grounds of diversity. In Louisville and Nashville Railroad Co. v. Ide, 114 U.S. 52, 5 S. Ct., 735, 29 L.ed 63, in affirming the circuit court's order remanding the case to the state court in accordance with the established rule, the Court said:

> The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here, it is certain joint contracts, entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible.
>
> It is said, however, that by the New York Code of Civil Procedure, section 1204, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants," and under this it

> has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable. The same rule undoubtedly prevails in many other States, but this does not make a joint contract several, nor divide a joint suit into separate parts.

As pointed out in 88 CJS, Trial, Section 9, Necessity or Propriety of Separate Trials of Separate Issues:

> There should be one full and comprehensive trial covering all disputed matters, and parties cannot, as of right, have a trial divided.
>
> Separate trials will be denied where the cases arise out of the same event . . . .

It has long been settled that to proceed in a matter, the Court must have jurisdiction of the subject matter of the case, jurisdiction of the persons involved in the litigation, and jurisdiction to render the particular judgment given. Van Ness v. Superior Court of Maricopa County (1950), 69 Ariz. 362, 213 P.2d 899; Wall v. Superior Court of Yavapai County (1939) 53 Ariz. 344, 89 P.2d 624.

The separate proceedings on Transamerica's counterclaim against F. M. Cocke to enforce paragraph 8, 9, and 10 of the escrow agreement were under Rule 19 beyond the jurisdiction of the Court in the absence of the Buyers, and the separate

proceedings on Buyers' suit against F. M. Cocke for specific performance of the escrow agreement were likewise beyond the Court's jurisdiction in the absence of the escrow agent.

It must therefore be concluded, since the Court did not have jurisdiction to proceed, that Rule 13 (i) did not authorize the separate proceedings or the separate summary judgments against F. M. Cocke on his affirmative action brought against the escrow agent and the Buyers for enforcement of the escrow agreement. The summary judgment in favor of the escrow agent does not even mention the Buyers or their rights or obligations, and the summary judgment in favor of the Buyers admits the escrow agreement but does not mention the escrow agent or its duties.

## VI.

## DUE PROCESS OF LAW AS PRESCRIBED BY THE RULES OF CIVIL PROCEDURE

In neither of the summary judgments against F. M. Cocke on his affirmative claims against the escrow agent and against the Buyers was there any finding of fact, conclusion of law or decision as to whether Buyers' letter of new demands, and the checks, notes and mortgages delivered into escrow thereby, constituted compliance with the escrow agreement, or a repudiation thereof. Nor was there any finding, conclusion or decision as to whether the escrow agent was bound to either close or cancel the escrow. Clearly, judgment was not rendered upon the whole case or for all the relief asked, since the

questions as to these fundamental and decisive facts were undeniably put in issue by F. M. Cocke in seeking the return of Sellers' deeds, and damages for delay.

However, in violation of Rule 56(d) the Court in neither of the summary judgments ascertained or specified that such material facts existed without substantial controversy.

As to the recent judgment in favor of Buyers, neither the Buyers in making their claim for damages suffered by reason of claimed delay by F. M. Cocke in the closing of the escrow, nor the Court in granting summary judgment in favor of Buyers on their Complaint For Specific Performance of the escrow agreement specified the particular date which marked the beginning of the claimed delay. Without a finding of whether and when Buyers complied with the escrow agreement, so that the escrow could close and Buyers could proceed with their development, and a finding of whether and when F. M. Cocke violated the agreement and so caused the claimed delay, there can be no determination of just when such delay began. As Buyers themselves stated in their letter of March 26, 1969:

> Some action must now be taken to see that this matter is closed so that title can pass to the buyers and they can proceed with their development and obtain releases for the annual payment and for other land as required.

Further, Buyers' Complaint irrevocably demanded that the escrow be closed and the title policies issued, even though Buyers failed to join Transamerica.

In view of these admissions that Buyers' right to begin development must await the close of escrow and the issuance of the title policies, and in the absence of findings that the escrow has actually been closed and the title policies issued, or findings as to how and when F. M. Cocke delayed same, the award of damages for his claimed delay in such development is based on delay over a period of time which has not yet begun.

Prior to the trial on the issue of damages, F. M. Cocke made three requests, as provided by Rule 52(a), for findings of fact and conclusions of law, all of which were and are material to, if not decisive of, the period of time during which the damages claimed by Buyers could have accrued. In violation of Rule 52(a) the requests have been ignored.

The Supreme Court of Arizona, in Fritts v. Ericson, 87 Ariz. 227, 349 P.2d 1107 (1960), held that where the request was made before trial, the special finding of fact and conclusions of law are mandatory.

In United STates v. Aluminum Co. of America, 2 F.R.D. 224 (1941) the court held that the District Court was without authority to dispense with the findings or the conclusions contemplated by the federal rule. (Rule 52.) The Court said:

> Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608,

609, 19 S.Ct. 761, 43 L.Ed. 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 49 S.Ct. 144, 73 L.Ed. 243. See in G. W. Giannini, Inc., 2 Cir., 90 F.2d 445, 447, 448, 111 A.L.R. 1492.

In the present case, as yet, I have not complied with Rule 52. Among the deficiencies are the following: I have made "no formal findings." I have not stated "separately: the court's "conclusions of law." With few exceptions, I have stated "but ultimate conclusions." I have not, -- at least except in a discursive and general way, -- formulated "underlying findings of fact." I have discussed only "portions of the evidence." In great part I have engaged in "reasoning." Neither the discussion nor the reasoning constitutes "special" or "formal" findings. So far I have refrained entirely from going into numerous issues made by the pleadings and have not even mentioned the evidence bearing on them. Nor have I "separately" or "specifically" determined, or even made a partial determination of, "all the issues which the case presents."

For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that,

> in order to obey the rule, as construed by the Supreme Court, -- regardless of the contents of the oral opinion, -- findings must be made and conclusions stated on all issues in the present case.

The fundamental rule as to findings of fact to support a judgment was clearly stated in the early case of Hultberg v. Anderson (1912) 97 N.E. 216, 252 Ill. 607, writ of error dismissed (1914), Anderson v. Swedish Evangelical Mission Covenant of America, 35 S. Ct. 418, 238 U.S. 605, 59 L.ed 1485:

> A judgment pronounced without any judicial determination of the facts which alone can support it is wanting in due process of law and may be impeached.
>
> A judgment pronounced without any judicial determination of the facts which alone can support such judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons. Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 17 Sup. Ct. 581, 41 L.ed 979; Fayerweather v. Rich, 195 U.S. 276, 25 Sup. Ct. 58, 49 L.ed 193.

It must therefore be concluded that the entry of the two judgements in violation of Rules 56(d) and 52(a) constituted

violations of due process of law, as prescribed by such Rules.

For the reasons set forth above the Judgments of November 10, 1970, and September 27; 1972, should be vacated and set aside for want of jurisdiction in the Court.

Respectfully submitted this
10th day of October, 1972.

By L. Alton Riggs, Jr.
Attorney At Law

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

RESPONSE TO F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, AND THE JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 12, 1972

Plaintiffs, by and through their attorneys undersigned, for their response to F. M. Cocke's motion to vacate the judgment of November 10, 1970 and the judgment of September 29, 1972 move the Court for entry of its order denying said motion. Said response is based upon all the proceedings had herein, including the proceedings had before the Court of appeals in a special action, and upon Memorandum of Points and Authorities attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

Job's lament that there is nothing new under the sun must have been made with the anticipation of this lawsuit in mind. Once again Mr. Cocke has set forth the same tired and stale arguments so consistently and frequently rejected by this Court in every phase of this litigation. It is submitted that by now the Court is painfully aware of Mr. Cocke's contentions, and that the restatement of the same in the form of a motion to vacate judgment

adds nothing new to these proceedings. Therefore, for the reasons set forth in dozens of arguments concerning the same matters raised in this motion, Plaintiffs move that the motion be denied.

Respectfully Submitted,

KELLY AND CORBIN

By Steven H. Schneider
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

RESPONSE TO F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, and the JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 24, 1972

Defendant and counterclaimant, Transamerica Title Insurance Company of Arizona, by and through its undersigned counsel, respectfully respond to the Motion of F. M. Cocke to vacate the Judgment of November 10, 1970, and the Judgment of September 29, 1972, as follows:

The Motion of F. M. Cocke is virtually a photostating of the multiple arguments that have been raised by Mr. Cocke in the trial court, the Court of Appeals, the Superior Court, again in the trial court and on numerous interim occasions. Each of the courts referred to above has judicially considered the arguments and authorities cited by F. M. Cocke and have on each occasion found the contentions of Mr. Cocke to be frivolous and the legal arguments non-persuasive. Suffice it to say that the Motion of Mr. Cocke is in all candor simply a rehash of various arguments that have been made time and time again in these proceedings and have been denied by the various courts

considering them and therefore, the issues sought to be raised by the Motion are without question res judicata. In particular, the Motion requests that the judgment be set aside for lack of jurisdiction, a question which was specifically determined by the Court of Appeals in Cocke v. Transamerica, 494 P.2d 756, and by the Arizona Supreme Court on a writ of special action brought by Francis M. Cocke and heard on June 6, 1972.

It is therefore respectfully submitted that for the reasons set forth in this response and in the numerous responsive pleadings filed by Transamerica Title Insurance Company of Arizona in this matter, that the Motion of Francis M. Cocke to vacate the Judgment of November 10, 1970, as modified on September 29, 1972, be denied and for such other and further relief as the Court deems appropriate.

BROWDER & GILLENWATER, P.C.

By Powell B. Gillenwater
Attorneys for Transamerica Title Insurance Company of Arizona